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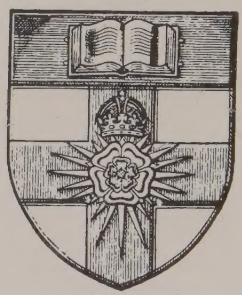

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THE

CRIMINAL APPEAL REPORTS.

WITH

SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED.

MAY 2, 1921, TO JULY 17, 1922.

EDITED BY

HERMAN COHEN,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

VOL. XVI.

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THE CARSWELL CO., LIMITED.

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1922.

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CORRIGENDA.

P. 26, headnote, line 5—For "Criminal Appeal Act" *read* "Criminal Evidence Act."

P. 30—For "Avory J." *read* "Roche J.," and for "Roche J." *read* "Avory J."

P. 31, headnote—For "other" *read* "or her."

P. 40, line 13—For "even though the answers may incriminate himself" *read* "even though the answers might tend to prove him guilty of the crime with which he is charged."

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY, AND MR. JUSTICE GREER.

GEORGE WETHERDEN.

1921
2 *May.*

The expression "possession" in 24 & 25 Vict. c. 99, the Coinage Offences Act, 1861, includes "constructive" possession, by s. 1.
Severity of sentence for a first serious offence.

Appellant was convicted at the Central Criminal Court, on 23rd March, 1921, of making counterfeit coin and of being in possession of implements for so doing, and sentenced by the Common Serjeant to three years' penal servitude.

He appealed against conviction and sentence.

C. G. L. Du Cann, for appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present, said that there was no evidence at the trial that Wetherden was privy to the making of counterfeit coin. He was a friend of Foy and frequently visited him at Wells Road in connection with betting transactions. Foy had been convicted of coining and had occupied two rooms in the house of which appellant had a latch-key of street door, but it was not proved that Wetherden had aided or abetted any coiner, and the room in which he visited Foy was probably not the apartment in which the actual coining plant was found by the police. He may have been aware of Foy's interest in metallurgy, but *his* concern was solely in connection with betting transactions. It was jumping to a conclusion, not supported by evidence, to find the appellant guilty of "making" counterfeit coin. He cited the dictum of Charles J. in *Owen,* 53 J. P. 822: 1889, to the effect that knowledge was possession. Appellant's previous record was good. His health was bad, and he was a widower with three young children.

1921
2 *May.*

GEORGE WETHERDEN.

Lawrence L.C.J.
Avory J.
Greer J.

[AVORY J.: Have you read the definition of "possession" in s. 1 of 24-5 Vict. c. 99?]

There was some evidence that appellant may have known of the coining. It might be "constructive" possession.

[GREER J.: But he had a latch-key enabling him to enter the house and visit Foy at pleasure.

The LORD CHIEF JUSTICE: Why did he carry a key? He did not live at Wells Road. When arrested he denied all knowledge of Foy and made false statements regarding the place and the key. On the day of Foy's arrest appellant had spent two hours with him in the morning. Foy called to him from the top floor, "Come up, George."]

Dummett for the Crown. The facts as proved and not contradicted are ample to sustain the conviction on both counts. The appellant was in the house for two hours immediately preceding the visit of the police, during which two hours coining had obviously being going on. The doors were open, the implements and counterfeit coins fully exposed to view, and moulds in process of baking. On such facts the jury are entitled to draw the inference that appellant was acting in concert with Foy, the tenant of the coining den. "Possession," as defined by the Act, is very wide in its meaning. The fact that appellant had his own latch-key to the house, enabling him to enter at pleasure, is in itself sufficient to justify a conviction for "possession" of the implements for coining found therein within the meaning defined in the statute, s. 1. Combined with the other evidence that he was frequently in the rooms where the coins were made, the verdict could hardly have been otherwise. (He was stopped by the Court.)

The LORD CHIEF JUSTICE: We have decided that the conviction must stand. In view of the wide language of the section dealing with possession, it ought to be scanned closely. Very extensive coining operations were conducted at Wells Road. The appellant was on terms of close friendship with Foy—the head of the gang—who had escaped, and a proof of their intimate relations was the latch-key entrusted to Wetherden, enabling him to visit the upstairs rooms, in which the coining

1921
2 *May.*

GEORGE WETHERDEN.

Lawrence L.C.J.

was done, whenever he pleased. He was, in fact, in the house for two hours on the morning of his arrest, the gas-ring was alight, 20 moulds were hot in the oven, and the whole house reeked with acid fumes. He was a frequent visitor, and on being arrested gave false accounts of the key and also of the places and times of his movements, denying all knowledge of his friend, Foy, or of his address, to whose lodgings and factory he had access. There can be no doubt that the appellant had, with Foy, joint control of the room used for coining. As regards sentence, there is only one minor conviction recorded against Wetherden. He was discharged from the army for illness contracted in the field, and is a widower with three children. In view of the wide language of the section dealing with possession, it ought to be construed narrowly. Having regard to his previous good conduct and the state of his health, we reduce the sentence to one of twelve months' imprisonment with hard labour.

Sentence reduced.

E. A.

JAMES MACMILLAN.

In a proper case, with the consent of appellant, the Court in awarding sentence will take into account outstanding charges which ought to have been considered in the sentence of the court below.

Appellant was convicted at Grantham Quarter Sessions, on 4th April, 1921, of larceny in a dwelling-house, and sentenced by the Recorder to two years' imprisonment with hard labour. He appealed against sentence.

The LORD CHIEF JUSTICE (to appellant): We have read your statement. Do you wish the Court to take into consideration three offences committed by you for which you have not been tried—bigamy in Cumberland in May, 1919; larceny of a bicycle in that county; and a theft of jewellery at Luton?

Appellant: Only the larceny and theft, my lord. I do not wish the bigamy to be taken into consideration. A nervous breakdown was the cause of my crime. I lost, through mental disease,

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2 *May.*

JAMES MACMILLAN.

Lawrence L.C.J.
Avory J.
Greer J.

control of my will power. I have been in prison since December, 1919.

The LORD CHIEF JUSTICE: The theft of currency notes from between the mattresses of the bed of the landlady in whose house appellant and his wife lodged is no proof of a nervous breakdown. He decamped with the money. There was, however, a technical oversight of the learned Recorder in omitting to ask the appellant at the trial if he consented to the larcenies in Cumberland and at Luton being taken into account in sentence. The Court corrects that mistake and also reduces the sentence to eighteen months' imprisonment with hard labour. The appellant is liable to be tried for the bigamy in Cumberland in 1919 after serving his present sentence.

Sentence reduced.

E. A.

HARRY TAYLOR.

On the trial of an allegation of being a habitual criminal the Court will presume, in the absence of evidence to the contrary, that the notice "to the offender" under s. 10 (4), prov. b of 8 Edw. 7, c. 59, the Prevention of Crime Act, 1908, has been duly served.

It is essential that the requirements of the statute defining "habitual criminal" should be carefully explained to the jury.

The Court may, of its own motion, quash a conviction.

Appellant, who was not present, was convicted at Walsall Quarter Sessions, on 17th February, 1921, of workshop-breaking and of being a habitual criminal, and was sentenced by the Recorder to five years' penal servitude and five years' preventive detention.

He appealed against sentence, but not against convictions.

It appeared that no evidence of service of notice on appellant was given at the trial.

[AVORY J.: If, in examining the documents of a case, we notice a defect in procedure which may have escaped the notice of a

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2 *May.*

HARRY TAYLOR.

Lawrence L.C.J.
Avory J.
Greer J.

defendant, or of his counsel, at the trial, we shall take it into account in considering an appeal.]

G. C. Lewis, for the Crown. Evidence of service of notice upon the appellant that he would be indicted as a habitual criminal was not given at the trial, but it was not necessary: *Waller,* 1910, 1 K. B. 364; 79 L. J. K. B. 184; 74 J. P. 81; 102 L. T. 400; 26 T. L. R. 142; 3 Cr. App. R. 213. See also *E. Turner,* 1910, 1 K. B. 346; 79 L. J. K. B. 176; 74 J. P. 81; 26 T. L. R. 162; 102 L. T. 367; 3 Cr. App. R. 103. So an indictment need not state that the Vexatious Indictments Act has been complied with: *Knowlden* v. *R.*, 33 L. J. M. C. 219; 5 B. & S. 532; 9 Cox C. C. 483: 1864: error.

AVORY J.: Although appellant is out of time we have extended the time for appeal in view of the important question of procedure involved. No evidence was given at the trial that notice had been given to him that he would be indicted as a habitual criminal. We presume in this case, as there was no evidence to the contrary, that the statutory notice had been duly served. Appellant in his evidence gave the names of places at which he said he had worked since his release from prison, and his statement was not contradicted. In summing up, the learned Recorder ignored the evidence of Taylor and gave no assistance to the jury in explaining the statute. This Court has repeatedly drawn attention to the fundamental rule that juries are entitled to complete directions from the presiding judge on the law bearing on the case being tried. We are satisfied that the conviction as a habitual criminal cannot stand, and it is quashed. We do not overlook the fact that appellant has a bad criminal record, but having regard to the proceedings at the trial, we have decided that three years' penal servitude is a proper sentence for the crime to which Taylor pleaded guilty. We have remitted two years accordingly.

Primary sentence reduced; conviction as habitual criminal quashed.

E. A.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY, AND MR. JUSTICE SALTER.

1921
11 *May.*

GEORGE THOMPSON.

The defence must be put to the jury in summing up.
In charges of fraud, there must be a direction on the intent.
Severity of sentence in the case of habitual criminals.

Application for leave to appeal against convictions, and appeal against sentence.

Appellant, who was present, was convicted at Leeds City Sessions, on April 11th, 1921, of obtaining goods by false pretences and of being a habitual criminal, and sentenced by the Assistant-Recorder to three years' penal servitude and five years' preventive detention.

Appellant handed in a written statement.

J. H. Thorpe, for the Crown, said that in view of the proceedings at the trial it would be difficult to maintain the convictions.

THE LORD CHIEF JUSTICE: The appellant was convicted for obtaining goods and a night's lodging by false pretences, and also with being a habitual criminal. It is manifest from the evidence at the trial that he was found guilty of obtaining from a widow residing at Armley a night's lodging and food, value about 5*s*. His story is that in riding into Leeds his horse bolted and (having lost his left arm) that his right arm was hurt by the fall. The lady, clearly moved by sympathy, bathed his arm "dozens of times" (to quote her own words) during the short time he lodged at her house. Thompson's explanation is that he never intended to defraud her, and would have sent her a postal order in payment of his debt but that he was arrested in connection with the possession of a mackintosh (the charge about which was abandoned), and

1921
11 *May.*

GEORGE THOMPSON.

Lawrence L.C.J.

was therefore unable to do so. In his pocket was found the address which she had given him. All that explanation may be true. It is a fact that appellant has a bad record and has previously been convicted as a habitual criminal. But we do not think that a man of 63 years, bad as his record may be, should be sentenced to three years' penal servitude for obtaining a night's lodging with supper and breakfast, and there is just a possibility that the defence was true. The lady's evidence confirms his statement that his right arm had bruises upon it, which she compassionately bathed.

We have arrived at the conclusion that the Assistant Recorder did not sufficiently expand or expound to the jury the defence put forward by the prisoner, who was not represented by counsel. The jury were simply told that the prisoner had made a representation which was untrue. That was not, in our view, a proper summing-up, for it entirely ignored an essential element in all such charges —the intent to defraud. Nor was there suitable comment on important points in the evidence which tell in the prisoner's favour. The convictions cannot be supported and the appeal is allowed.

Convictions quashed.

E. A

HAROLD JOHNSON GRAYSON.

The police have no right to interrogate arrested persons with reference to any charge against any one of them nor to invite from one co-defendant a statement against another.

Appeal against conviction and sentence.

Appellant, who was not present, was convicted on 7th April, 1921, at the North Riding of Yorkshire Sessions, of shopbreaking, and sentenced by the Chairman to ten months' imprisonment with hard labour.

R. H. Vernon Wragge for the Crown. The only direct evidence against the appellant was his own admissions and the statements of the police officers who repeated in his presence what the other two prisoners had stated, and in view of the proceedings at the

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11 *May.*

HAROLD JOHNSON GRAYSON.

Lawrence L.C.J.
Avory J.
Salter J.

trial and the admission of hearsay evidence it would be difficult to maintain the conviction.

The LORD CHIEF JUSTICE: We do not think that the conviction can be upheld. The appellant, with two other men, Yeoman and Marshall, was convicted for shopbreaking. The police improperly, and without warning, interrogated the appellant before trial and accepted statements by Yeoman and Marshall—both of whom pleaded guilty at the trial—implicating the appellant. The police had no right to examine Grayson, or to invite statements against him from other persons in custody whose sole aim was to throw blame upon the appellant. No stolen property was found upon Grayson, and the only evidence against him were the statements given at the police station by the two other prisoners. The learned Chairman failed to caution the jury that the police evidence was a mere repetition of the uncorroborated statements of Yeoman and Marshall, and we are of opinion that the conviction cannot be upheld. The appeal is allowed. This sort of proceeding—it was in fact an informal preliminary trial in private by the police—is not fair to prisoners and, as this Court has already observed, is not in accordance with principles of English justice.

Conviction quashed.

E. A.

13 *May.*

The Court (The Lord Chief Justice, and Avory and Salter JJ.) also sat on May 13th.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE LUSH AND MR. JUSTICE SANKEY.

ANDREW CAMERON.

1921
30 *May.*

Severity of sentence for blackmail.

This was an application for leave to appeal against an order of Mr. Justice Coleridge.

Applicant was convicted at the Central Criminal Court, on the 29th April, 1921, of threatening to accuse of crime with intent to extort money, and sentenced by Darling J. to fourteen years' penal servitude.

SANKEY J.: The applicant was convicted of demanding money by menaces. In plain English, he was convicted of blackmail, for he had threatened to accuse the prosecutor of sodomy. He induced the prosecutor to go to his rooms and there made improper suggestions to him. When his overtures were rejected he threatened to accuse the prosecutor of the most abominable offence known to the law. At the trial the applicant gave evidence and made scandalous accusations against the prosecutor—a procedure which admitted evidence of his own character—which was bad. His criminal record dates from 1903 at Aberdeen, and there are fifteen convictions up to the time of his last arrest. He has now changed, in a statement submitted to this Court, the whole of the story which he had told at the trial. Although the sentence is severe, we have before us the record of applicant's convictions for the past eighteen years, and, having regard to all the circumstances of the case, we do not regard the sentence of fourteen years' penal servitude as being too heavy. We agree with Mr. Justice Darling that the prisoner is "far too dangerous a pest to society to be at large." His application is dismissed.

Application dismissed.

E. A.

1921
30 *May.*

Lawrence L.C.J.
Lush J.
Sankey J.

GEORGE ELLIOTT.

Severity of sentence.

Applicant was convicted at London County Sessions, on 27th April, 1921, of warehouse-breaking, and sentenced by the Deputy-Chairman to nine months' imprisonment with hard labour consecutive to three months' imprisonment then being served. He applied for leave to appeal against sentence. It appeared that applicant had been sentenced on 2nd April, 1921, at the North London Police Court to three months' imprisonment and that his recognisances entered into in December, 1920, to be of good behaviour for twelve months had been forfeited.

The Lord Chief Justice: We allow this application. The appellant had been bound over as a first offender. He is now serving the sentence passed by the police magistrate in April last, and we alter the sentence passed at the County Sessions to nine months' imprisonment with hard labour to be concurrent with, instead of consecutive to, the sentence of three months' imprisonment passed at the North London Police Court on 2nd April, 1921.

Sentence reduced.

E. A.

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30 & 31 *May.*

FRANK PEPPER and ANNIE ELLEN PLATT.

During the hearing of this case the Court ordered that it should be re-heard by five judges.

See p. 12, below.

JOHN CORR.

1921
13 *June.*

Lawrence L.C.J.
Lush J.
Sankey J.

Severity of sentence.

Appellant was sentenced by Mr. Justice Swift, at Liverpool Assizes, on 5th April, 1921, to fifteen months' imprisonment for bigamy.

He appealed against conviction and sentence.

H. Metcalfe (under s. 10 of Criminal Appeal Act) appeared for appellant, who was present.

Elliot Gorst, for the Crown, was not called upon.

The Lord Chief Justice: We do not propose to reconsider all sentences passed for bigamy, but this is a special case and the circumstances are exceptional. Appellant's wife deserted him during his army service and lived with another man, leaving his child, aged five years, homeless. The child was taken to the house of the woman with whom he subsequently went through the ceremony of marriage. He was genuinely attached to the woman who had cared for the child, and we think that a lighter sentence would be a sufficient punishment. We reduce the sentence to one of four months' imprisonment.

Sentence reduced.

E. A.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE LUSH, MR. JUSTICE ROWLATT, MR. JUSTICE SANKEY AND MR. JUSTICE McCARDIE.

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On an indictment for conspiracy the prosecution is not bound to allege a precise date or act for or as the inception of the conspiracy.

Statements of one conspirer are not admissible against another unless they be in furtherance of the conspiracy.

One Court of Quarter Sessions may pass sentence on a conviction obtained at another.

Appeal on certificate referred to a full Court (p. 10, above) on 31st May, 1921, against conviction at Stoke-on-Trent Sessions, on 30th March, 1921, for conspiracy to obtain money by false pretences. The Recorder (who had died since the trial) had postponed sentence on Pepper, and Platt had been bound over.

They were not in custody.

J. B. Matthews, K.C. (*S. A. H. Burne* with him), for appellants. There was no charge of conspiracy with any third person or with an unknown person. Pepper was managing director of the Hanley Garage Co. and Platt was a book-keeper. On September 18th, 1920, a message was received at the garage for a taxi-cab required for a journey to Birmingham by a member of the Bucknall Hospital staff. The charge of 4*l.* for hire was debited to the hospital account. Afterwards the matron telephoned that the journey was a private one of a Mr. Stevenson and that the charge should be made to him. There was some evidence that Pepper had been informed of this erroneous charge and that he had referred it to Platt. In November, 1920, the quarterly account sent by Pepper to the hospital contained the item, "Taxi hire to Birmingham, 4*l.*" A few days later Mr. Stevenson saw

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FRANK PEPPER AND ANNIE ELLEN PLATT.

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Lush J.
Rowlatt J.
Sankey J.
McCardie J.

Platt and told her that the item should be "Half-barrel of oil, 4*l*." Without making any inquiry or consulting Pepper, Platt altered the account as desired by Mr. Stevenson. When two officials called to make inquiry, Pepper produced his books which showed the original charge unaltered. However improperly Platt had acted, counsel submitted that there was no evidence of conspiracy against Pepper, who had reprimanded Platt for carelessness at the time the error was pointed out to him. The statements made by Platt after the discovery of the wrongful change in the account from taxi hire to oil, which tended to incriminate Pepper, were not admissible in evidence against him.

J. G. Hurst, K.C. (*Graham Milward* with him). The offence charged is conspiracy. The gist of that offence is an unlawful agreement, not the act which follows it. Participation in a design has to be proved: see Wright on Criminal Conspiracies (1873), p. 70. Although the agreement is the gist of the offence, it is not necessary to show an actual association or confederacy—that may be left to reasonable inference—it may be collected from the other circumstances of the case: 3 Chitty's Criminal Law (1826), pp. 1141, 1143. There was in this case evidence from which the jury were entitled to infer that both defendants were parties to an unlawful agreement. It is clear that the statements made by Platt to third persons are not admissible against Pepper: *Blake*, 6 Q. B. 126; 13 L. J. M. C. 131: 1844; but they are available against Platt herself, and there is other evidence against Pepper fit for the consideration of the jury apart altogether from Platt's statements to third persons. Notwithstanding the submission at the trial that there was no case, this Court will no doubt consider the whole evidence given at the trial: *Power*, 1919, 1 K. B. 572; 88 L. J. K. B. 593; 83 J. P. 124; 120 L. T. 577; 35 T. L. R. 283; 14 Cr. App. R. 17.

C. a. v.

E. A.

27 *June.*

The following judgment of a majority of the Court was delivered by the LORD CHIEF JUSTICE:—

In this case Frank Pepper and Annie Ellen Platt appeal against their conviction at the Quarter Sessions for the County Borough

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FRANK PEPPER AND ANNIE ELLEN PLATT.

Lawrence L.C.J.

of Stoke-on-Trent upon an indictment for conspiracy. That indictment was in the following terms:—

> "For that they on the 18th day of September, 1919, and on divers dates between that date and the 11th day of December, 1919, in the County Borough of Stoke-on-Trent in the County of Stafford, conspired together with intent to obtain from the Stoke-on-Trent and Stoke Rural Joint Hospital Board by false pretences the sum of 4*l.*, by falsely pretending that a half cask of oil had been sold and delivered by the said Frank Pepper to the said Board."

Each prisoner gave evidence, but the jury convicted both of them. The learned Recorder postponed sentence upon Pepper, and admitted him to bail, and bound Platt over in the sum of 5*l.* to come up for judgment if called upon. He further certified that the case was a fit case for an appeal by Pepper and Platt to the Court of Criminal Appeal under s. 3 (b) of the Criminal Appeal Act, 1907, upon the ground that there was no evidence, or alternatively, no sufficient evidence fit for the consideration of the jury, and that the case ought to have been withdrawn from the jury.

Pepper seeks to set aside the conviction upon those grounds, whilst Platt contends that there was no evidence against Pepper and that he ought to have been acquitted, and that that being so she in her turn is entitled to go free.

There was undoubtedly sufficient evidence upon which the jury could have found a verdict against Platt on her admissions when enquiries were made and she was arrested, but the learned judge was careful to point out that while any statement made by one of the conspirators for the purpose of forwarding the conspiracy is evidence against the other conspirator, a statement made by one conspirator after the whole thing is over and after the conspiracy is discovered is not evidence against the other conspirator, and that they were not to take the statement of one conspirator about the liability of the other as evidence against that other if it was no longer in furtherance of the conspiracy.

Platt's contention is therefore so far correct, that if there was no evidence to go to the jury against Pepper, not only is he entitled to be acquitted, but she is also entitled to a verdict of not guilty.

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The one point therefore to consider in this case is whether there was evidence upon which the jury could have returned a verdict against Pepper, and care must be taken not to consider evidence which, though admissible against Platt, was not admissible against Pepper.

The facts are as follows:—

Pepper held two-thirds of the shares in a company known as the Hanley Garage, Limited, and Platt was a clerk employed there as ledger clerk. In one position or another she had been with the company about five years. Among the customers of the garage was a hospital known as the Bucknall Hospital, and the garage supplied them from time to time with motor cars on hire, with oil and with other necessaries for cars. The course of business was that credit notes for goods supplied or cars hired by the hospital were sent directly after the charges were incurred, and accounts were rendered quarterly. These accounts were initialled by one Stephenson, the engineer at the hospital, countersigned by Dr. Phillips, the medical superintendent, passed by the Board and paid.

On September 18th, 1919, Stephenson telephoned for a taxi-cab to be sent to Birmingham, and a charge of 4*l.* was incurred. A credit note for this amount was sent to the hospital and there opened by the matron, who being of opinion that the charge was wrongly made against the hospital rang up the garage on the telephone and was answered by John Gibb, the taxi-manager at the garage. The matron told Gibb that the hire was not the hospital's, but must be for Stephenson's private account. Gibb then went to the top office, where he saw Pepper and Platt, and he told Pepper that the matron had telephoned and said that the car to Birmingham did not go down to the hospital, but to Mr. Stephenson. Pepper then said, "Tell Miss Platt all about it." Gibb brought his book containing the entry and handed the same to Platt, who was sitting at the same table as Pepper. This book shewed a charge of 4*l.* for the hire of the taxi going to Birmingham. In due course of time this charge appeared in a quarterly statement rendered to the hospital upon November 1st, 1919. Subsequently Stephenson came to the garage with this account, saw Platt, and said he required it altered to read "half barrel of oil," and in explanation said, "It is quite all right, as the taxi was for Dr. Read and

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others." Platt, in a statement made on the 13th of February, 1921, exhibit F., which is not evidence against Pepper, said that she did not consult anyone as she thought Stephenson would not be guilty of anything that did not meet with the approval of his committee, and she proceeded, " I then had another bill typed out as he desired and handed both to him. When Mr. Pepper came in I told him what had been done, and he told me I should not have done it, but so far as I know he took no action to remedy the mistake."

The account was thus altered, and instead of showing an item " hire of taxi, 4*l.*," it shewed half a cask of oil, 4*l.*

The hospital paid it, and subsequently enquiries were made into this and other alleged irregularities in transactions between the garage and the hospital by a man of the name of Wallett, but before dealing with his evidence it is well to pause and see how the matter stands thus far with regard to Pepper. He was the managing director, and interested to the extent of two-thirds in the share capital of the company. He said that he passed the account for taxi hire, that he glanced through all the accounts, and opened the letters. The taxi-manager, Gibb, in giving evidence, said that subsequent to Wallett's enquiries he noticed Miss Platt was worried and constantly crying, and that the reason for it was that Pepper had put the blame for the alteration of hire to oil upon her, and that she did not think it was fair to put the blame upon her when she had only followed out his instructions. She was referring to a letter of the 11th December, 1919, written by Pepper to the Town Clerk of Stoke-on-Trent, who was interested in and making enquiries with regard to the hospital's account with the garage. That letter is in the following terms:—

11*th December,* 1919.

E. B. SHARPLEY, ESQ.,
Town Clerk,
Town Hall,
Stoke-on-Trent.

DEAR SIR,

Further to your call to-day *re* Bucknall Hospital Board's account. With reference to item Half Barrel Oil. I have made very close enquiries and find that the one you

have in your possession is not the original invoice we sent to the Board. The one we sent is identical to the copy we have in our possession and produced to your chief clerk for inspection.

I find on making these enquiries that Mr. Stephenson came to the garage and pointed out to one of our junior lady clerks that it was a mistake to say it was a hire, it was for Half a Barrel of Oil which is £4. Our clerk, thinking no harm was being done so long as the price was not altered, carried this out on her own account.

We have already reprimanded her for this and we feel sure you will see it is one of those things that occur in business that is very unfortunate yet at the same time we have no control over.

The original invoice Mr. Stephenson took back with him as far as we can gather.

(191) Yours faithfully,

HANLEY GARAGE, LTD.
FRANK PEPPER.

Gibb went on to say that Miss Platt told him that Stephenson had brought back the voucher and asked her to alter it. She could not do so without Pepper's consent, and Pepper was not in the office at the time. She, however, went and saw him, told him the business, came back and made the alteration.

Again this was not evidence against Pepper, and further, it was denied by Platt.

It must, however, be taken that Pepper did have the conversation referred to by Gibb, viz., that when he was told that the account did not belong to the hospital but did belong to Stephenson he said, "Tell Miss Platt all about it," and that they did not believe Pepper when he said that the first he ever heard of anything whatever connected with this taxi-ride was on the 11th December.

The jury were therefore entitled to consider—

(1) The fact that Pepper was the managing director.
(2) That he was largely interested in the share capital.
(3) That he supervised the accounts.
(4 That he was not telling the truth when he said that he knew nothing about the affair till the 11th December, but that

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the truth was that he had heard something about it weeks and weeks before.

(5) That in his letter of the 11th December he was endeavouring to throw all the blame upon Platt, whom he described as one of his junior lady clerks, whereas in fact she had been with him for a period of five years, was the ledger clerk, and it was her duty to look after the books.

More significant still was the evidence given by the witness Wallett, who went down to make the investigations on December 11th. He first saw Platt and questioned her about the half cask of oil that was supposed to have been delivered to the hospital. She went out, and subsequently Pepper came in and at once said, "Good morning, Mr. Wallett. Now things are quite all right and above board, you can see any books that we have got here." The books were shewn to Wallett, and while they were looking at them Stephenson appeared at the door, but according to Wallett, Pepper shook his head to Stephenson to clear off. Stephenson then sauntered to the back of the workshop, whereupon Pepper told one of the men, "There is Stephenson, tell him to clear off, I cannot see him to-day." At that moment Stephenson's taxi hire was the subject of conversation. While Pepper, Wallett, and Miss Platt were looking at the books it was seen that they shewed taxi hire and not oil, but Pepper simply said, "There must be some mistake," and he did not ask Miss Platt to account for it.

It will be observed that at this interview there were present both Miss Platt and Stephenson who knew all about the alteration of the item from taxi hire to oil, that enquiries were being made about it, and that Pepper not only did not ask Miss Platt to give her explanation, but signalled to Stephenson to leave, and sent a message to him to do so when he loitered behind.

We have not forgotten the explanation advanced on behalf of Pepper that he might not have cared to rebuke one of his employees in front of a stranger, but we must also remember that subsequently, when the police were enquiring from Miss Platt what had taken place, Pepper brought her to the police office, said that he had heard the police had been speaking to her, that she was there prepared to make a statement, but that he, being her employer, it was nothing but right that she

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should make that statement before him. The police refused to allow him to remain.

In our view all these matters were fair questions for the consideration of the jury, and prove facts from which they were entitled to infer the guilt of the defendants. It was sought to discount the facts by pointing to each one in turn and saying that taken by itself it was of little or no value. It was further sought to tie the prosecution down by asking them to define the exact moment at which the conspiracy began, and the exact act which marked its inception. We think it is a fallacy and not permissible to divide a case of this sort up into a number of facts and to deal with and consider each fact separately without reference to or consideration of the bearing of other incidents and facts upon it. It may be true to say that no inference can be drawn from a number of facts each of which has no evidential value, but we are of opinion that it is impossible to say that in this case none of the facts above referred to had any evidential value. When such facts are considered as a whole, and the bearing of one upon the other is duly appreciated, we think their cumulative effect is of such a character that the jury were entitled to draw the inference from them that the defendants were guilty of conspiring, as alleged.

It is true that if the inference to be drawn from a number of facts is consistent either with the guilt or innocence of the accused, undoubtedly they would be entitled to a verdict of acquittal upon the ground that the prosecution had not made out their case, but bearing in mind that the jury were entitled and must be taken to have found that Pepper was telling an untruth when he said that no such conversation took place at the beginning as Gibb swore to, and bearing in mind his conduct on December 11th, we are of opinion that it is impossible to say that the inference to be drawn from the facts is equally consistent with Pepper's guilt or innocence.

It must be remembered that the Court of Criminal Appeal Act does not interfere with trial by a jury, and that this Court is not entitled to set aside a verdict merely because they disagree with it. We have not here the advantage which a jury has of seeing the witnesses and observing their demeanour. The way and manner in which a witness deals with and answers a question cannot be gauged by considering merely the question and answer as they appear subsequently in print. The jury in the present

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Lawrence L.C.J.

case might well have taken into consideration the attitude and demeanour of the appellant Pepper when cross-examined about his conduct, when enquiries were being made by Wallett.

In the result both appeals fail.

With regard to the sentence upon Pepper, that was put off till the next Quarter Sessions. It is a matter of great regret that the learned Recorder who presided at the trial has died in the interval, but in our view the next Court of Quarter Sessions presided over by his successor is entitled to pass sentence upon Pepper (*a*). We think that a copy of the shorthand note of the trial which has been before us should be supplied to him, and that Pepper or his counsel should have an opportunity of being heard before the sentence is pronounced.

Appeals dismissed.

Solicitors for the Appellants—*Doyle, Devonshire & Co.*, for *J. E. Moxon & Co.*, Hanley.

Solicitors for Respondents—*Gibson & Weldon*, for *E. B. Sharpley*, Town Hall, Stoke-on-Trent.

(*a*) Cf. *Spratling*, 5 Cr. App. R. at 210 (1910), *per* Pickford, J., and *Richardson*, 8 Cr. App. R. 159 (1913), *per* Avory, J.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SANKEY AND MR. JUSTICE BRANSON.

FREDERICK McNERNEY.

1921
20 *June.*

On conviction as a habitual criminal, the Court, as a rule, approves of a sentence of preventive detention.

The applicant was convicted on May 4th, at the Central Criminal Court, of larceny and being in possession of housebreaking implements by night, and for being a habitual criminal, and sentenced by Commissioner Atherley-Jones to three years' penal servitude.

He applied for leave to appeal against convictions and sentence.

THE LORD CHIEF JUSTICE: There are no grounds for granting this application. Although the applicant was convicted as a habitual criminal, the learned judge did not sentence him to a term of preventive detention. It has been amply demonstrated that preventive detention is the one form of punishment for crimes of this character which seems to produce any beneficial effect. A large proportion of prisoners thus sentenced have improved in consequence, and many have adopted honest lives.

By passing a sentence of three years' penal servitude—which we think is a most unfortunate condition precedent to a sentence of preventive detention—and then not passing a sentence of preventive detention, the learned judge has produced the curious result of making the conviction as a habitual criminal non-effective, for the Prevention of Crime Act, 1908, s. 10 (2) (b) provides that to become a habitual criminal he must not only have been found to be one but must have been "sentenced to preventive detention."

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FREDERICK McNERNEY.

Lawrence L.C.J.

In the circumstances we refuse leave to appeal; if we allowed the application the Court, on hearing the appeal, might add to the sentence of penal servitude a term of preventive detention, which should have been awarded at the trial.

Application dismissed.

E. A.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SHEARMAN AND MR. JUSTICE SANKEY.

WILLIAM ROBERT POWELL.

1921
27 *June.*

On an allegation that defendant is a habitual criminal the summing up should not deal with the policy of the system of preventive detention.

The appellant was convicted at the Central Criminal Court, before the Common Serjeant, on June 2nd, of larceny, and also of being a habitual criminal, and was sentenced to three years' penal servitude and five years' preventive detention.

He appealed against the sentence, and also applied for leave to appeal against his conviction as a habitual criminal.

Appellant, in person, alleged that the learned Common Serjeant in summing up to the jury on the question whether he was a habitual criminal, had dwelt at great length on the advantages and benefits to habitual criminals of the system of preventive detention, and he contended that such considerations should not have been placed before the jury, and must have operated on their minds to his prejudice.

THE LORD CHIEF JUSTICE: In this case there has been "no substantial miscarriage of justice," and this Court cannot interfere. The appellant has been previously convicted eight times. The Court considers the appellant's criticism of the learned Common Serjeant's summing up to be well founded in the abstract. The topics complained of should not have been dealt with at that stage. But the case comes within the proviso to s. 4 (1) of the Criminal Appeal Act.

Appeal dismissed.

W. D. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SANKEY.

1921
11 *July*.

VERA BERTHA JOACHIM.

Observations on a sentence of penal servitude for life.

The applicant was convicted of manslaughter, on an indictment for murder, at the Central Criminal Court, on June 6th, 1921, and was sentenced by Darling, J. to penal servitude for life. She now appealed from an order of Roche J. refusing extension of time for leave to appeal against conviction and sentence, and for legal aid. She was not present, and no counsel appeared.

AVORY J. delivered the judgment of the Court: The applicant was convicted of manslaughter on her trial for murder. On the evidence it was clear that she had caused the death of a woman by performing an unlawful operation on her to procure abortion. The Court had considered whether there was any ground for interfering with the sentence. The applicant was more than seventy years of age, and, from her record, she was fortunate that, in this case, she was not convicted of murder. The only ground on which the jury could convict her of manslaughter was that she might not have appreciated that she was doing that which was dangerous to life or that which was calculated to cause grievous bodily harm. Had the jury known her previous history, there would have been no doubt that she knew perfectly well the dangerous nature of the operation. In 1895 she was convicted of attempting to procure abortion, and was sentenced to penal servitude. In 1904 she was charged with the murder of another woman by the same means and convicted of manslaughter, and sentenced to seven years' penal

servitude. Notwithstanding these warnings, she was again pursuing this course as a trade. As the learned judge at the trial said, it was necessary that she should not have any further opportunity of killing other women.

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VERA BERTHA JOACHIM.

AVORY J.

Application refused.

W. D. T.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE AVORY, AND MR. JUSTICE SANKEY.

HENRY BEECHAM.

1921
18 *July.*

The proviso to s. 4 of the Criminal Appeal Act applied despite wrongful cross-examination on previous convictions and an unsatisfactory summing up.

It is improper to cross-examine a defendant with a view to compel him, if he does not admit the commission of an offence, to put his character in issue (within the meaning of s. 1 (f) (ii) of the Criminal Appeal Act).

It is not, semble, *putting character in issue (in that sense), when the question is whether excessive speed was used, to disclaim a desire to drive at a great speed.*

Appeal against conviction on points of law.

The appellant was convicted of manslaughter on 24th June, 1921, at the Hertfordshire Assizes, before Rowlatt J., and was sentenced to twelve months' imprisonment in the second division.

Curtis Bennett, K.C. (with him, *Roland Oliver*), for the appellant, who was not present. Appellant was convicted of manslaughter of a child by alleged negligent driving of a motor car. The first ground of appeal is that the learned judge's summing up amounted to misdirection and non-direction by giving a wrong impression of the evidence of one witness called for the defence, and ignoring the evidence of three others. The second ground is that, at the trial, Sir Richard Muir, counsel for the Crown, asked the appellant, in cross-examination, for what purpose he had bought the particular car. This question was repeated, in varying form, eight times, and, on eliciting an answer from the appellant that he did not like to drive at a high rate of speed, counsel, with the sanction of Rowlatt J., asked him about previous convictions for excessive speed. The Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1 (f) (ii), safeguarded a person charged

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HENRY BEECHAM.

Darling J.
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and called as a witness from being asked, or required to answer, such a question unless he has (*inter alia*) "given evidence of his good character." Here the appellant's character had not been put in issue. The questions were improperly allowed, and the previous convictions must have operated prejudicially on the minds of the jury.

[He was stopped by the Court.]

Ronald Walker for the Crown. On the first point, the summing up was sufficient and not misleading.

On the second point, the appellant was putting his character in issue by inducing the belief that he was a careful driver. Even if the cross-examination was irregular, the Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 4 (1), proviso, authorises this Court to dismiss the appeal, inasmuch as "no substantial miscarriage of justice has actually occurred." Without this particular cross-examination the jury must have convicted. He cited *Hudson*, 1912, 2 K. B. 464; 7 Cr. App. R. 256; *Williams and Woodley*, 14 Cr. App. R. 135, 1920.

Curtis Bennett, in reply, was directed to confine himself to the effect of the proviso in s. 4 (1).

There is no case where previous convictions have been wrongfully brought in in which the conviction has been allowed to stand.

[AVORY J. referred to *Solomon*, 2 Cr. App. R. 80, 1909.]

In that case the previous convictions were not for offences of the same class. He cited *Rodley*, 1913, 3 K. B. 468; 9 Cr. App. R. 69; *Rouse*, 1904, 1 K. B. 184; *Fisher*, 1910, 1 K. B. 149; 3 Cr. App. R. 176; *Biggin*, 1920, 1 K. B. 213; 14 Cr. App. R. 87; *Kurasch*, 1915, 2 K. B. 749; 11 Cr. App. R. 166; *W. F. Wilson*, 11 Cr. App. R. 251, 1915; *Ellis*, 1910, 2 K. B. 746; 5 Cr. App. R. 41.

DARLING J.: Our attention has been directed to the summing-up, and we have carefully read and considered it,

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HENRY BEECHAM.

Darling J.

and our joint opinion is that the summing-up by the learned judge was certainly unfortunate, in that it omitted specific reference to the evidence of the witnesses who were in the appellant's car. We are satisfied, however, that attention was forcibly drawn to this evidence by appellant's counsel, and that the evidence and its bearing on the case cannot have been absent from the minds of the jury when they considered their verdict.

With regard to the cross-examination, we are bound to say that we cannot approve of the manner in which the appellant was led by counsel for the prosecution into making the statement which, it was contended, amounted to putting his character in issue. If this were held to be legitimate, practically every defendant might be forced into that same position. Nor are we satisfied that the appellant did by his answer put his character in issue within the meaning of the Criminal Evidence Act. Assuming the cross-examination on that point to be irregular, and the answer possibly prejudicial to the appellant, we have to consider whether we can apply the proviso in s. 4 of the Criminal Appeal Act.

Here we have come to the conclusion that the summing up was defective and unsatisfactory, and that the point of law was wrongly decided against the appellant. That point was raised by him, for, when counsel was putting the questions he enquired whether he was bound to answer, and the learned judge ruled wrongly against him. Can we in these circumstances apply the proviso?

We have considered the cases cited to us. There are decisions which seem to us sufficient. In *W. F. Wilson* (above) Avory J. gave the judgment of the Court: and in *Williams and Woodley* (above) Lord Reading C. J. quoted with approval the language of Channell J. in *Cohen and Bateman*, 2 Cr. App. R. 197, 1909, at p. 208, to the effect that the question is whether, notwithstanding the irregularity, the jury *must* inevitably have arrived at the same verdict of guilty against the appellant.

In our opinion the expression of the true principle on which this proviso is to be applied is to be found in those two cases, and we have unanimously come to the conclusion, on a careful examination of all the indisputably legal evidence, that the jury in the present case must have found the appellant guilty of manslaughter.

We have unhesitatingly come to the conclusion that, even had

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HENRY BEECHAM.

Darling J.

there been a perfect summing up and even had that question not been allowed in cross-examination and the answer given, the jury, who heard all the evidence, must certainly have come to the conclusion that the appellant was guilty of manslaughter.

Appeal dismissed.

W. D. T.

Solicitors for the Appellant—*Messrs. Russell-Cooke & Co.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SANKEY AND MR. JUSTICE BRANSON.

1921
25 *July.*

ROSE EMMA GOODING.

Convictions quashed in view of fresh facts.

This case was referred to the Court by the Home Secretary.

Appellant had been twice convicted of libel at the Sussex Assizes, the first time on December 13th, 1920, before Avory J., when she was sentenced to fourteen days' imprisonment; the second time on March 3rd, 1921, before Roche J., when she was sentenced to twelve months' imprisonment. She had applied to this Court for leave to appeal, and the application had been dismissed on April 18th, 1921. She subsequently petitioned the Home Secretary.

Travers Humphreys for the Crown was at once called on. As a result of independent inquiries instituted by the Director of Public Prosecutions, and of certain facts which have come to light and which could not have been known at either trial, it is now established that the appellant was not the person who committed the offences of which she was convicted.

Eustace Fulton, for the appellant (under sect. 10 of the Criminal Appeal Act), who was present, had nothing to add.

The LORD CHIEF JUSTICE: Facts have come to light which required investigation, which were not before either of the trial Courts, or before this Court when the application for leave to appeal was made and refused. In view of those new circumstances and the opinion formed on them by the authorities dealing with criminal matters, it seems right to the Court to accede to the view

that the case should not be proceeded with in open court, but that the Court should quash both convictions.

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ROSE EMMA GOODING.

Lawrence L.C.J.

Convictions quashed.

W. D. T.

TOM STANLEY LYNN LUND.

26 *July.*

The onus *of proving, on a trial for bigamy, that defendant knew that his other spouse was alive at a given time is on the prosecution.*

Appeal against conviction on law.

The appellant was convicted of bigamy, at the Derbyshire Assizes, on 21st June, 1921, before Avory J., and sentenced to nine months' imprisonment with hard labour.

Maurice F. Healy for the appellant, who was not present. The appellant was married to his lawful wife in 1912, and last saw her in 1913. The absence for seven years was proved. In 1915 he tried to get a divorce, but failed to find his wife. On December 4th, 1920, he went through the form of marriage with another woman. The learned judge asked the jury to decide whether the defendant knew that his wife was alive when he went through this form of marriage. There was no evidence that he knew his wife was alive unless it was to be inferred from his statement when arrested: "the only blunder I made is that I told 'my wife'" [meaning the second woman] "I was divorced." The *onus* of proof that during the seven years' separation the defendant knew of his wife's existence is on the prosecution. That *onus* was not discharged by the prosecution in this case. He cited (among other cases) *Mary Briggs*, 26 L. J. Rep. M. C. 7; D. & B. C. C. 98: 1856; *John Curgerwen*, L. R. 1 C. C. R. 1; 35 L. J. Rep. M. C. 58; 13 L. T. Rep. 383; 14 W. R. 55; 11 Jur. (N. S.) 984; 10 Cox C. C. 152: 1865; *Thomas Jones*, 11 Q. B. D. 118: 1883.

H. T. Wright for the Crown. There was sufficient evidence for the jury to find as a fact that the defendant knew his wife was living.

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The LORD CHIEF JUSTICE: The *onus* of proving knowledge on the part of the defendant that his wife was living rests on the prosecution. The question really is, whether there is evidence of such knowledge. All that the prosecution was able to rely upon was his statement that the only blunder he had made was that he told the second woman that he was divorced. The statute relating to the excuse of seven years' absence is a beneficial one in favour of persons who enter upon a marriage like this. The prosecution must shew knowledge. Inference is not knowledge. Therefore, according to *Curgerwen* (above), we hold that the *onus* of proof rests on the prosecution, and that *onus* not having been discharged, the conviction must be quashed.

Conviction quashed.

W. D. T.

Solicitors for the Appellant—*Morris and Bristow,* Agents for *Rickards and Cleaver,* Alfreton.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BRAY AND MR. JUSTICE SANKEY.

JOHN CHRISTY AND CHARLES MUNRO.

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29 *July.*

Severity of sentence.

Appellants were convicted at the Norwich City Sessions, on the 4th July, 1921, of being armed with intent to commit a felony and of being in possession of housebreaking implements. Munro was further convicted of being a habitual criminal.

Christy applied for leave to appeal against his conviction and sentence of four years' penal servitude; Munro appealed against his sentence of five years' penal servitude and five years' preventive detention.

The men had been to Ascot and came to Norwich, apparently having a good deal to drink on the way. They were found by the police crouching at the rear of a shop with a complete and up-to-date outfit of housebreaking implements. Both men had bad records, but Christy had been living honestly since his last release in 1915, and therefore was not charged with being a habitual criminal. Munro had been previously convicted as a habitual criminal in 1911, when he was sentenced to three years' penal servitude and five years' preventive detention. On his release in 1918 he joined the army, where his character was marked "good." After his discharge in 1919 he worked at different places, and in August, 1920, met a man named George Bastable, a bookmaker, who employed him as a clerk. Bastable himself had several previous convictions, and it was suggested that Christy and another man had led Munro astray again.

W. M. Powell for Munro (who was not present). Bastable's bad record should not prejudice appellant. If he acted honestly

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towards Bastable in his employment as a clerk, that coupled with his previous employment and his army record should have saved him from a sentence of preventive detention.

Christy in person.

M. Falcon for the Crown was not called on.

The LORD CHIEF JUSTICE: Christy was a dangerous and accomplished burglar, and the sentence on him was not excessive. Munro was also a man with a bad record, but the Court desired to give all possible weight to the fact that he appeared to have a good record in the army and to have made attempts to live honestly since. The sentence of preventive detention must stand, but the term of penal servitude would be reduced from five years to three, the minimum term on which preventive detention could follow.

One sentence reduced.

J. W. H.

Solicitors for Appellant—*Claude Lumley & Co.*

SOLOMON GILBERT.

Severity of sentence on an alien.

Appeal against a sentence recommending deportation.

Appellant was convicted, together with three other men, at the Leeds City Sessions, on the 5th July, 1921, of warehouse-breaking, and sentenced to twelve months' imprisonment with hard labour and recommended for deportation.

J. R. Macdonald for the appellant (who was not present). Appellant is an Austrian Pole, born in 1869. He came to this country at the age of eight, and has lived here ever since. He married a Russian woman here and had eleven children, all British born, three of whom fought in the war for this country. If he

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were deported it would be to a country which was a foreign country to him, and one with the language of which he was unacquainted.

SANKEY J.: The appellant was properly convicted of warehouse-breaking, and there is no ground for interfering with the conviction or sentence of twelve months' imprisonment. With regard to the sentence of deportation, he is a Pole and has lived many years in this country. He has eleven children and three of his sons served in the war. In these circumstances we think that the principle laid down in *Grunspan*, 8 Cr. App. R. 269: 1913, may be followed, and the same mercy extended to appellant in this case as was shewn to the appellant in that case. The result will be that the recommendation of deportation will be quashed.

Recommendation of deportation quashed.

J. W. H.

Solicitor for Appellant—*A. Masser.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SANKEY AND MR. JUSTICE BRANSON.

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ALFRED ISAAC LOVETT.

Leave to appeal granted in respect of summing-up, but refused on a point of law.

Application for leave to appeal against conviction, and appeal against sentence. An appeal on a point of law was in the Summary List.

Appellant was convicted at the Norfolk Quarter Sessions, on June 29th, 1921, of larceny, and was sentenced to five years' penal servitude.

Sir William Bagge for the appellant, who was not present. Appellant and a man named Flint (who applied for leave to appeal against sentence) were tried together and both were convicted. On the night of June 20th some fowls were stolen from a farm. Two man were seen driving a pony and a trap, which was afterwards identified as belonging to appellant. When examined the following day, there were feathers and fowl droppings in the trap, and some of the stolen fowls were found on premises occupied by Flint. Appellant's housekeeper, Lily Nicholls, gave evidence for the defence, and she was cross-examined by counsel for the prosecution with regard to a suggestion that appellant's pony and trap had been lent to two men on the night in question. This witness was asked whether appellant had ever lent the pony and trap to anyone before and to whom? She said, "Yes, once or twice." Then she was asked, to whom? She mentioned two names. She was then asked, where were they now? Answer: "They are in prison." Objection was taken to that evidence being got from that witness in that way by cross-examination. It is submitted that such questions were wrongly put to appellant's housekeeper. It was difficult to remove the effect of the questions from the minds of

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the jury. Further, appellant asks for leave to appeal on the ground of misdirection or non-direction. There were two defendants tried together, and there was no practical distinction drawn in the summing-up between the case against one and that against the other. The two cases were essentially different and should have been distinguished by the Chairman in his summing-up. He referred to *Albert Edward Lewis*, 14 Cr. App. R. 33: 1919; *William James Twigg*, 14 Cr. App. R. 71: 1919.

[The LORD CHIEF JUSTICE: I think there is a great deal to be said for your point that the direction was very inadequate, but I cannot see that that had any effect.]

It is submitted that the burden is not on appellant to shew that the inadequacy of the summing-up had a deleterious effect; it is enough to shew that appellant has been deprived of the benefit of an adequate summing-up. Finally, the sentence is too severe.

[The LORD CHIEF JUSTICE: We need not trouble you on the question of the sentence; we agree that it was excessive and ought to be reduced.]

It is submitted that appellant ought to have leave to appeal against his conviction on the ground that questions were wrongly put to the witness Nicholls, appellant's housekeeper, and on the ground of the inadequacy of the summing-up.

The LORD CHIEF JUSTICE: We think that you are entitled to leave to appeal, and therefore the appeal will come on for hearing when the prosecution are represented here. But with regard to the summary point of law arising on the questions put to the witness, Lily Nicholls, in cross-examination, that point is a bad one, and we cannot grant leave to appeal on that point. Leave to appeal is given on the ground of the inadequacy of the summing-up and on the sentence.

One application granted.

Solicitor for Appellant—*Walter Joseph*, Norwich.

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30 *July.*

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JEREMIAH MINIHANE.

A defendant giving evidence under the Criminal Evidence Act, 1898, is not dispensed from answering a question merely because his answer might tend to criminate some other person.

Appeal against conviction and sentence.

Appellant was convicted at the Maidstone Assizes, on July 2nd, 1921, before Mr. Justice Rowlatt, of shooting with intent to do grievous bodily harm, and was sentenced to ten years' penal servitude.

Henry C. Dickens for appellant, who was present. Appellant was convicted at the Maidstone Assizes of shooting with intent to do grievous bodily harm. On June 17th four young Irishmen hired a taxi-cab at New Cross Station at 11.30 p.m. They went on a wire-cutting raid. They had between them in the taxi at least two revolvers. There were also some wire-cutters found in the taxi-cab. The question is whether appellant was one of the four men in the taxi-cab. They were stopped near Bromley, and it was said that appellant was identified by the police as the fourth man in the taxi-cab. It is submitted that it is a case of mistaken identity. The case was a weak one, and one that required considerable scrutiny. There was misdirection or inadequate direction. Moreover, the evidence of one of the defendants, named Robinson, was rejected on the ground that, having given certain evidence, he refused to answer certain questions on the ground that the answers would incriminate someone else. Upon this the Judge directed the jury that such evidence was valueless and refused to take any notes thereof. Another, Affection, announced that he would not give evidence incriminating any other person, whereupon the Judge refused to allow his evidence to be taken at all. The Judge has no right to shut out the evidence of a defendant on the ground that he refuses to answer incriminating questions. The remedy was to punish such witness for contempt of court, and not to reject his evidence. There is no authority at all on the matter. The nearest case is *Chandler* v. *Horne*, 2 M. & R. 423: 1842.

[The Lord Chief Justice: Do you suggest that a defendant

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who exercises the privilege given to him by statute, of going into the witness-box, has a right to select what questions he is to answer?]

No, it is contempt of court to refuse to answer questions, but such evidence as he does give must be taken for what it is worth.

[The LORD CHIEF JUSTICE: Is it not fundamental that when they elect to go into the witness-box they shall answer all such questions as are put to them?]

The remedy is by punishing them for contempt of court and not by excluding their evidence. In one case substantial evidence had been given. He referred to Taylor on Evidence, vol. 2, p. 1007, 11th ed.

Hohler, K.C. (and *M. Falcon*), for the Crown. Whatever view may be taken of the point of law raised, the evidence against appellant was so clear that no injustice has been done. But defendants who avail themselves of the privilege given them by the Criminal Evidence Act, 1898, cannot select the questions they are to answer. They must answer all the questions put to them. The point raised is not a matter of appeal at all. It is a matter entirely for the trial judge and cannot be reviewed: *Ex parte Fernandez*, 10 C. B. N. S. 3; 30 L. J. C. P. 321: 1861. There was no misdirection.

The LORD CHIEF JUSTICE: Appellant was indicted for shooting with intent to murder and with intent to do grievous bodily harm. He was convicted of shooting with intent to do grievous bodily harm, and was sentenced to ten years' penal servitude. He appeals against conviction and sentence. The case against the appellant was a very strong one. He and the other defendants went out to commit outrages in the interest of politics. The question is, whether the evidence was adequate and proper to support the verdict of the jury. The matter to be decided was one for the jury, and the Court is of opinion that there was ample evidence to support the verdict found by the jury. It was a strong and most convincing case. Counsel for appellant relies on a point of law. He says that the learned Judge misdirected the jury, in

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that he did not give the proper weight to the evidence of Robinson, one of the other defendants indicted, and that he wrongly rejected the evidence of Affection, another of them. When Affection was in the witness-box he announced his determination not to give evidence which would incriminate a friend. That was a clear notice that he would only give evidence on terms other than the ordinary terms on which witnesses give evidence. The statute, the Criminal Evidence Act, 1898, which enables a defendant to give evidence is careful to protect the interests of such persons availing themselves of it. The statute imposes certain conditions for that purpose, but there are no conditions dealing with the matter arising in this case. A defendant who gives evidence is, unlike any other witness, bound to answer questions even though the answers may incriminate himself. When he announces that he will not give such evidence, the Court is not bound to receive the evidence of such a witness. Then with regard to Robinson, who refused to answer a question on the ground that it would incriminate someone else; Robinson had answered a number of questions, and it may be that the learned Judge could have and should have rejected the evidence of Robinson wholly. But he did not do so. The Court cannot see that there was anything in the nature of misdirection in the summing-up. The Judge was entitled to express his own opinion, but he left it to the jury. The Court cannot interfere with the conviction or sentence.

Appeal dismissed.

Solicitor for Appellant—*J. H. MacDonnell.*

T. W. M.

BEFORE

MR JUSTICE BRAY, MR. JUSTICE SWIFT, AND MR. JUSTICE BRANSON.

ALFRED ISAAC LOVETT(*a*) AND ROBERT FLINT.

1921
23 *August.*

In the case of co-defendants the jury must, if necessary, be carefully charged to distinguish between their cases.
Severity of sentence.

Sir William Bagge for appellant, Lovett, who was not present. Appellant appeals on the ground of non-direction in the summing-up of the Chairman amounting to misdirection in view of the essential difference in the evidence against the two defendants. He dealt at length with the evidence adduced against Lovett. He relied on the ruling of this Court delivered by Lord Reading. C.J., in *Twigg*, 14 Cr. App. R., 71: 1919, for the proposition that a defendant is entitled to an adequate summing-up.

C. H. Thorpe for the Crown.

Appellant, Flint, who was not present, and for whom no counsel appeared, applied for leave to appeal against his sentence of five years' penal servitude. He had been several times previously convicted for similar offences.

BRAY J.: Without holding that in every case, however clear, there must be a full direction to the jury, we consider that Lovett's

(*a*) See p. 36, above.

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was a case requiring careful direction from the Chairman. In his case there was none, and the conviction cannot stand. In Flint's case we are of opinion that a sentence of five years' penal servitude was too severe, and that it should be reduced to one of eighteen months' imprisonment with hard labour.

Conviction quashed.

Sentence reduced.

Solicitor for Appellant—*Waller Joseph*, Norwich.

W. D. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SANKEY, AND MR. JUSTICE ACTON.

ERNEST GEORGE JELLYMAN.

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When guilty knowledge is in issue there ought not (especially in the case of a defendant of good character) to be a conviction if the facts are as consistent with ignorance as knowledge.

Appellant, who was not in custody, was convicted at the Swansea Assizes, before Roche J., on 25th July, 1921, of conspiracy, and bound over and ordered to pay £350 towards the costs of the prosecution. Other defendants were joined in the indictment, which was for obtaining money by false pretences and conspiracy to defraud. At the close of the case for the Crown, counsel for appellant submitted that there was no evidence to go to the jury against Jellyman. Roche J. ruled that there was no evidence against Jellyman of obtaining by false pretences, but that there was evidence of conspiracy. The jury convicted Jellyman of conspiracy, but recommended him to mercy.

The proceedings arose out of the operations of the National Alliance House Property Investment Company, Limited. The prosecution alleged that the agents of the company with the knowledge of the appellant (who was a director, and, latterly, chairman of the company) falsely represented to various persons that the company had a scheme for advancing the full purchase-money for houses on payment of certain premiums by intending purchasers, and thereby obtained considerable sums.

Inskip, K.C. (with him *Wilfrid Lewis*), for the appellant.

The oral statements by the agents were at variance with the prospectus issued by the company and were quite unknown to the

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appellant. He could not be held criminally responsible for such statements. No fraud was brought home to his knowledge. There was no evidence that he must have known of it. The learned judge ought to have withdrawn the case of conspiracy against him from the jury. At the highest he allowed himself to be misled by others. Negligence could not be converted into evidence of guilt. At the most, the facts proved were as consistent with innocence as with guilt. The minutes of the board should not have been left to the jury generally to put any construction on them. There was really no case to go to the jury against the appellant, and the conviction should not be allowed to stand.

Sir Ellis Griffith, K.C. (with him *St. J. Francis-Williams*), for the Crown. The submission that there was no case having been overruled at the trial, this Court is entitled on appeal to take into consideration any adverse evidence given for the defence: *Power*, 1919, 1 K. B. 572; 88 L. J. Rep. K. B. 593; 120 L. T. Rep. 577; 14 Cr. App. R. 17.

[The LORD CHIEF JUSTICE: We think that that case lays down the true principle.]

The certificates, with Jellyman's signature, are the links binding him to the conspiracy. The minutes shew constant claims for misrepresentation. There was evidence on which the jury could properly act, and the conviction should stand.

Inskip in reply.

The LORD CHIEF JUSTICE: The question which this Court has to consider is whether the facts are more consistent with knowledge than with ignorance. Roche J., in dealing with the submission that there was no case to go to the jury, thought that it was a weak case, but that, as it concerned a humble portion of the community, it should be investigated to the dregs. No definite incriminating fact has been proved against the appellant which would leave a reasonable man with no possible conclusion but that he knew what was going on. This Court thinks upon the whole that it cannot be said with certainty that Jellyman was a guilty man at any time. The case was full of suspicion; but

suspicion should not have prevailed with the jury. The evidence was insufficient to support the conviction of a man of good character who does not appear to have benefited to the extent of one penny from the frauds. He allowed himself to be gulled. He was not as assiduous in his duty as he ought to have been, but that is not sufficient to make out a criminal charge. The conviction must be quashed.

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Conviction quashed.

W. D. T.

Solicitors for the Appellant—*A. Charles Knight & Co.*, for *Arthur Porter and Crust*, Romford.

FRANK JOHN EAGLETON FISHER AND THOMAS STOTT.

24, 25, 26
October.

Severity of sentence in view of previous good character.

Appeals against convictions on law, and against sentences.

The appellants were convicted, after a twenty-three days' trial, at the Central Criminal Court, on July 28th, 1921, with others, before the Common Serjeant of London, of conspiracy to defraud, and were sentenced, Fisher to fifteen months', and Stott to eighteen months' imprisonment, with hard labour. The facts were connected with the company mentioned in *Jellyman* (above, p. 43). Stott was secretary and Fisher assistant secretary of the company.

Comyns Carr (with him *I. G. Kelly*) for Fisher, who was present, took the preliminary point that the case against Fisher having been dismissed by the Alderman at the Guildhall, an indictment would not lie under the Attorney-General's fiat, the remedies provided by the Vexatious Indictments Act, 1859 (22 & 23 Vict. c. 17), s. 1, being alternative and not cumulative. *Rogers*, 66 J. P. 825, 1902, was a decision of the Recorder of London the other way, but it was open to this Court to review it. The matter had become more important by reason of the Grand Juries (Suspension) Act, 1917, 7 & 8 Geo. V. c. 4.

The Court overruled the objection.

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Comyns Carr. Under the terms of the subscribers' contracts with the company, the company were not responsible for any statements by representatives at variance with the prospectus. If the company were not civilly liable the officials could not be criminally liable. An error of judgment is not a criminal offence. Fisher never made representations to any subscriber. Agents who had made misrepresentations had been dismissed on his report. The learned Common Serjeant's summing up, which lasted three days, was confusing as a whole. He suggested that to be over-sanguine might amount to criminal negligence, and drew an illustration from manslaughter. He ignored the true legal construction of the contract.

[The LORD CHIEF JUSTICE referred to Taylor on Evidence, sect. 42, 10th ed., and Roscoe's Criminal Evidence, 209, citing *Rosenson*, 12 Cr. App. R. 235, 1917.]

Comyns Carr. It cannot be evidence of fraud to insist on one's legal rights. The summing up put points in favour of the defendant Russell (who was acquitted), which should have been put equally in favour of Fisher.

With regard to the sentence, the public mischief should not be allowed to obscure Fisher's position.

F. Hinde (with him *A. P. Bunt*) for Stott, who was present, prayed in aid the argument of counsel for Fisher so far as it applied to his client. Stott had been secretary of the company since 1919. He was 56 years of age, with an honourable record. He resigned in October, 1920, seeing that the company could not carry out its obligations. The summing up of the learned Common Serjeant did not lay sufficient stress on his position. Evidence was wrongly admitted against him.

[*Whiteley, K.C.*, for the Crown, cited *Edgar Wentworth Sanders*, 1919, 1 K. B. 550; 14 Cr. App. R. 9, for the proposition that objections to the admission of evidence must be taken at the trial, and are not open on appeal.]

Hinde. There was no evidence of fraud or conspiracy on the part of Stott. He was not really responsible. He had no power

to return premiums. *Biggar* v. *Rock Life Assurance Co.*, 1902, 1 K. B. 516.

With regard to sentence, one of eighteen months' hard labour was harsh for a man of proved good character.

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Whiteley, K.C. (with him *Roland Oliver*), for the Crown. The construction of the contract was not a question for the jury. Extreme recklessness may be evidence of fraud. Here there was sufficient evidence on which the jury properly convicted.

The LORD CHIEF JUSTICE: On the whole, the Court has come to the conclusion that no sufficient ground has been shown for interfering with the convictions. The question was one for the jury. The Common Serjeant's summing up has been subjected to searching criticism. It was remarkable how few blemishes had been found in it. The illustration of manslaughter was unhappy, but that had been corrected later. The refusal to construe the contract, and the leaving it, as a whole, to the jury to read, were immaterial.

With regard to the sentences, looking at the whole facts, the good character of both appellants, and the possibility of punishment injuring their health, the Court reduced them in each case to nine months' imprisonment with hard labour, to date from conviction.

Sentences reduced.

Solicitors for the Appellants—*Arthur Benjamin and Cohen; P. W. Pardy.*

ISAAC HICKSON.

27 *October.*

Sentence reduced in view of mitigation of that of another defendant.

Application for leave to appeal against conviction and sentence.

The applicant was convicted, at the Swansea Assizes, on July 25th, 1921, before Roche, J., of false pretences and conspiracy, and sentenced to three years' penal servitude for false pretences, and two years' imprisonment for conspiracy, to run concurrently.

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27 *October.*

ISAAC HICKSON.

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Acton J.

This case also arose out of the operations of the same company as that mentioned in *Jellyman* above, p. 43, and *Fisher and Stott*, p. 45.

Wilfrid Lewis for the applicant, who was present. His client, so far as he knew anything of the misrepresentation by agents, did all he could to prevent their continuance. The learned judge had not put the facts sufficiently fully before the jury.

With regard to sentence, he was a man of good character and advanced years, and the sentence of three years' penal servitude was unduly harsh, especially having regard to the reduction of the sentences in the cases of *Fisher and Stott*.

Sir Ellis Griffith, K.C. (with him *St. J. Francis-Williams*) for the Crown.

The LORD CHIEF JUSTICE: The matter was pre-eminently one for the jury. There was overwhelming evidence to support their verdict, which could not be disturbed. The question of sentence was a different matter. A sentence of three years' penal servitude might appear harsh if not mitigated in view of the reductions of sentences in the cases of *Fisher and Stott*. The sentence on Hickson would, on that ground alone, be reduced to one of twelve months' imprisonment with hard labour, to date from conviction.

Sentence reduced.

Solicitors for Appellant—*Pomeroy & Son*, Bristol.

W. D. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SANKEY, AND MR. JUSTICE BRANSON.

NATHAN HOUSE.

1921
1 *November.*

It is a misdirection to tell the jury, in general terms, that affirmative is stronger than negative evidence.

Counsel for the prosecution ought not to appeal to religious or racial prejudices.

Appeal against conviction.

The appellant, who was on bail, was convicted at the Central Criminal Court, on 12th July, 1921, before Mr. Commissioner Judge Atherley-Jones, of larceny as a bailee, and was sentenced to nine months' imprisonment with hard labour.

Whiteley, K.C. (with him *St. J. Hutchinson*), for the appellant, who was present. Appellant is a Russian Jew who has been here for twenty-three years, during the last twelve of which he has been a hairdresser in Shaftesbury Avenue, and was given an excellent character by the police. He was charged with stealing £116, the property of one Waite, a seaman. On May 31st, Waite, who was expecting to go to sea, came to live at appellant's house, and in the presence of Andrews, another seaman, handed over £151 in notes to keep for him. On June 1st appellant gave him back £20, on June 2nd £5, and, according to the evidence of these two men, on June 3rd another £10 in the presence of both. On June 4th Waite asked for the £116 balance, to which appellant replied, "I gave you your money yesterday." The sole issue for the jury was: Did appellant on June 3rd give Waite only £10 or the whole balance? Appellant gave evidence that he had repaid the whole on the 3rd, when Andrews was not present. He called a woman from his house who said money was handed over on the 3rd when Andrews was not present. The jury had to decide

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whether Waite and Andrews were truthful witnesses. There are three grounds of appeal:—

1. Wrongful admission of evidence. Counsel for the prosecution (two conducted the case below) opened to the jury that someone on behalf of appellant had offered to Waite a hundred pounds to withdraw the charge. Counsel for the defence at once objected, as there was no such evidence on the depositions and no notice of such additional evidence had been given, whereupon counsel for the prosecution rejoined: "I can prove it." This was never withdrawn. Waite, in evidence-in-chief, was asked: "Has anyone since this case approached you to give you £100 not to go on with it?" He replied, "Yes." On objection again taken, the judge admitted that the question was improper, but only ruled that the answer was not conclusive of the defendant's guilt. No evidence of such an offer was tendered subsequently nor was it mentioned in the summing up. It is submitted that the only inference sought to be drawn by the prosecution was that this was an admission of guilt, and being wholly unfounded and not neutralised in the summing up, the Court will quash the conviction. (He was stopped on this point.)

2. The judge misdirected the jury in saying, "It becomes, therefore, a question for you whether you accept the evidence of these two men. The affirmative is always stronger than the negative. The man who says a certain thing happened is more credible than a man who, in his defence, says the thing did not happen." This is clearly a misdirection.

[The LORD CHIEF JUSTICE: It has the effect of shifting the *onus*.]

Further, there was below conflicting evidence on the credit of the two men, to which there was no reference in the summing up —one point, viz., whether on June 3rd in the evening Andrews had said, "We've lots of money."

3. The case for the prosecution was conducted unfairly. Counsel for the prosecution who finally addressed the jury—not the one appearing to-day—attempted to inflame their minds against the appellant by saying, "This is a clear case of the despoiling of the Egyptians by the Israelites"; "our British

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seamen falling into the hands of these sharks"; "now they have got Palestine or Mesopotamia they are not satisfied"; "these brutes, these people coming from nowhere, robbing our British subjects"; "this man living between Leicester Square and Palestine," &c., &c. The learned Commissioner did not attempt to stop this strain. This was an appeal to religious prejudice: see *Banks*, 1916, 2 K. B. 621; 12 Cr. App. R. 74.

G. St. J. Macdonald, for the respondent, submitted that there was sufficient evidence, apart from that alleged to be wrongly admitted, on which the jury could convict. He did not admit that what was said was a misdirection; it seemed to be the learned judge's own idea, but he did not agree with it: indeed, he thought that the reverse was true. Any prejudice resulting from counsel's reply was removed by the summing up. The judge had said, "The real question is, whom do you believe?"

The LORD CHIEF JUSTICE: The conviction would be quashed on the three grounds of misreception of evidence, misdirection, and the conduct of counsel. With regard to the phrase quoted as misdirection, counsel for the Crown has not sought to justify it, but suggests that it is the learned judge's fixed idea. I hope this is not so. The language of counsel complained of was highly improper and ought to have been checked at the time. It is impossible to say that it could not have influenced the jury. The whole trial was unsatisfactory.

Conviction quashed.

W. D. T.

Solicitor for Appellant—*Norman H. Aaron.*

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE SANKEY, AND MR. JUSTICE BRANSON.

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JOHN JONES.

Order to pay costs of prosecution quashed.

Appeal against sentence.

The appellant, who was present, was convicted on his own confession at the Worcestershire Sessions, on 17th October, 1921, of housebreaking, and was sentenced by the Chairman to five years' penal servitude and ordered to pay the costs of the prosecution. He had been previously convicted several times since 1884, and on the last conviction had received a sentence of seven years' penal servitude. A sum of £57 odd was found in his possession, representing his savings.

The appellant in person.

No counsel appeared for the prosecution.

DARLING J.: It is true that the appellant has a bad record. But we have heard something of his circumstances. He is sixty-five years of age, and since he last came out of prison, five or six years ago, he has done his best to get an honest living. Unlike many others, he saved his money. All the circumstances were not sufficiently taken into consideration. Having regard to them, the sentence of five years' penal servitude will be reduced to one of eighteen months' imprisonment with hard labour. We also reverse the order that he should pay the costs, because we do not want him to be in such circumstances when he comes out of prison that he should be driven to commit another crime.

Sentence reduced; order to pay costs quashed.

W. D. T.

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Unless the facts constitute an obtaining property by false pretences there cannot be a conviction for that offence by virtue of s. 44 (3) *of the Larceny Act,* 1916, *on an indictment for larceny.*

The Court on quashing a conviction for one offence, cannot substitute a conviction for another (by virtue of s. 5 (2) *of the Criminal Appeal Act) of which there has been an express acquittal.*

Appeal against conviction on a point of law.

Appellant was convicted at the Sheffield City Sessions, on October 14th, of obtaining rings by false pretences, and was sentenced by the Recorder to six months' imprisonment in the second division.

Jardine (with him *J. Neal*) for the appellant, who was not present. She was indicted for larceny as a bailee, but was found guilty of obtaining by false pretences, by virtue of s. 44 (3) of the Larceny Act, 1916 (*a*). The case for the prosecution was that certain valuable rings were entrusted to her by one Moore, a jeweller, with whom she had had previously many dealings on a large scale. With the rings went the following approbation note: "From L. Moore. On approbation, Mrs. Fisher. (Here follows a list of rings.) These goods remain my property until invoiced by me. L. M. 10th May, 1921." Moore never intended nor did he purport to pass the property in the rings to appellant. In fact he himself held the rings on sale or return.

[DARLING J.: She is simply his agent to sell.]

She neither returned nor paid for four of the rings, having in fact pledged them.

It could not, therefore, be contended that there was no case to

(*a*) S. 44 (3) is: "If on the trial of any indictment for stealing it is proved that the defendant took any chattel, money or valuable security in question, in any such manner as would amount in law to obtaining it by false pretences with intent to defraud, the jury may acquit the defendant of stealing and find him guilty of obtaining the chattel, money or valuable security by false pretences, and thereupon he shall be liable to be punished accordingly."

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go to the jury on a charge of larceny, but of this they must be deemed to have acquitted her, as their verdict was "Guilty of obtaining by false pretences."

Such a verdict is bad in law, because on such an indictment s. 44 (3) only permits it to be found when the jury are satisfied that the taking "amounted in law to obtaining by false pretences," and this could not be so here.

There was no case of false pretences to go to the jury. There was, indeed, evidence to shew that the rings were handed to appellant by reason of her false statement that she had a customer called Mrs. Parkin who wanted them. But the evidence fails to shew that the property in the rings ever passed to her. The "appro." note shews the contrary.

The distinction between false pretences and larceny depends on the question whether the ownership or the possession only passed, and the offences are mutually exclusive. Therefore, this might be a case of larceny, but could not be a case of false pretences.

E. Fisher, 22 Cox, C. C. 340; 74 J. P. 427; 103 L. T. 320; 26 T. L. R. 589; 5 Cr. App. R. 102: 1910.

It follows that the Recorder was wrong in telling the jury that they could convict of obtaining the rings by false pretences.

The verdict of the jury was only possible under the provisions of s. 44 (3), which makes an acquittal of larceny a condition precedent to a conviction of false pretences. After such acquittal no substitution of a verdict of larceny is possible. Cf. *T. Evans*, 85 L. J. K. B. 1176; 114 L. T. 646; 12 Cr. App. R. 8: 1916: larceny and receiving.

This is the point of law. If necessary it will further be contended that appellant's case was never put to the jury.

The Court called on—

J. H. Thorpe for the Crown. Assuming that the point of law taken for appellant is good, under s. 5 (2) of the Criminal Appeal Act (*b*) the Court could substitute the proper verdict: larceny simple, or by a bailee.

(*b*) S. 5 (2) is: "Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Criminal

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DARLING J.: The words "the jury must have been satisfied of facts which proved him guilty of that other offence" cannot mean when they have definitely acquitted of that other offence, which is the case here. The point of law taken is good. It was a case of larceny or of nothing.

Conviction quashed.

Solicitors for Appellant—*A. Neal & Co.*, Sheffield.

THOMAS DUNN.

Severity of consecutive sentences.

Appellant, in person, appealed against two sentences passed on October 17th by the Chairman of the Durham Quarter Sessions, viz., three years' penal servitude for obtaining by false pretences, and the same for larceny as a bailee, to be concurrent but consecutive to a sentence of three years' penal servitude passed at the Leeds City Sessions on June 27th, 1921. When the Leeds conviction took place appellant had 270 days *remanet* to serve (as he was on ticket-of-leave), and this period he must serve whatever the new term of penal servitude was.

The Court ordered the three years' (dating from October 17th) term to be concurrent with the other term of three years (but exclusive of the *remanet* days).

Sentence reduced.

H. C.

Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence and pass such sentence in substitution for the sentence passed at the trial . . . ."

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LEWIS HAROLD BELL.

Before outstanding charges can be taken into account in sentence, it must be clear that defendant consents.

Appeal against sentence by leave of the Court.

Appellant was convicted on three counts of obtaining food and other things by false pretences at the West Riding (Wakefield) Sessions, on October 17th, 1921, and was sentenced by the Chairman to three years' penal servitude. There were four similar charges pending against him, and, in reply to the Chairman, he stated that though he was not guilty in all of them, he wished them taken into account.

He now informed the Court that he did not wish the outstanding charges which he did not admit to be considered in this sentence.

The Court thought that perhaps the Chairman had been influenced by his apparent consent, reduced the sentence to twelve months' imprisonment with hard labour, pointing out to him that he was still liable to be tried on the other charges.

Sentence reduced.

H. C.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SANKEY, AND MR. JUSTICE BRANSON.

JOHN THOMAS WYATT.

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In s. 31 *of the Larceny Act*, 1916, "*threaten*" *is not confined to written words. Conduct subsequent to spoken words may amount to a threat, even if the words are not addressed to the aggrieved person.*

There may be a proposal "to abstain" within the section, although after a threat uttered the threatened person approaches the utterer with a view to his abstaining.

Appeal against conviction on law.

Appellant, who was on bail, was convicted, at the Essex Assizes at Chelmsford, on the 16th June, 1921, before Shearman J., of threatening on 26th January to publish matter with intent to extort a valuable thing from one Mogford, and of proposing to abstain from publishing matter, with the like intent, and was sentenced to twelve months' imprisonment. The indictment of two counts was framed under the Larceny Act, 1916 (6 & 7 Geo. V. c. 50), s. 31 (*a*). It was alleged that appellant, who was a managing clerk to a Southend solicitor who had previously prosecuted Mogford, a publican, successfully for assault on a man, and to whom Mogford had paid the costs ordered on those proceedings, had threatened that unless he received a further £30 in discharge of costs, he would reveal to the licensing justices that Mogford was a bookmaker and so prevent the renewal of his licence, and on January 26th appellant served on Mogford a notice of intention to object to his licence on that ground. On January 31st appellant

(*a*) S. 31: "Every person who (a) with intent to extort any valuable thing from any person; (b) directly or indirectly threatens to print or publish or directly or indirectly proposes to abstain from or offers to prevent the printing or publishing of any matter or thing touching any other person (whether living or dead) shall be guilty of a misdemeanour."

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told Levy, a friend of Mogford's, that if he got the £30 he would not oppose the licence. The next day Mogford, by his wife, sent his cheque for that amount to appellant, who gave her a receipt, and, the same day, a notice that he withdrew the notice of January 26th. Payment was stopped. Further, soon after the police court proceedings, before the bill of costs had been delivered, appellant told the same friend that he "would get" Mogford with "that," viz., the betting book of Mogford's firm.

Hohler, K.C. (with him *Wardley*) for the appellant, took the preliminary objection that the offence under s. 31 (sub-s. 2) was confined to printed matter. Spoken words must be either seditious, obscene, or calculated to lead to a breach of the peace. The notice given by appellant to Mogford of intention to oppose the renewal of his licence before the licensing justices was a legitimate legal step and could not be a threat within the section. He cited: *Yates and Another*, 6 Cox, C. C. 441: 1853; Odgers on Libel, 1911 ed. 460; Russell on Crimes, 1158, note (j).

The LORD CHIEF JUSTICE, without calling on *Bryan*, for the Crown, overruled the objection.

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Hohler resumed his argument for the appellant on the facts. There was no evidence of any threat. There was no proposal on appellant's part to withdraw opposition to the licence. The learned judge failed to direct the jury that any threat must be one calculated to operate on the mind of a reasonable man. The alleged threat just after the police-court proceedings was never shewn to have been communicated to Mogford.

[The LORD CHIEF JUSTICE: "A nod is as good as a wink to a blind horse."]

He cited: *Southerton*, 6 East, 126: 1805; *Tomlinson*, 1895, 1 Q. B. 706; 64 L. J. M. C. 97; 43 W. R. 544; 72 L. T. R. 155; *Boyle and Merchant*, 1914, 3 K. B. 339; 10 Cr. App. R. 180; *Yates and Another* (above); *Walton*, 32 L. J. M. C. 79; 9 Cox, C. C. 268: 1863.

Bryan, for the Crown. The notice of opposition to the licence was the threat. Licensing justices are not a Court, and no privilege

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attaches to proceedings before them. *Attwood* v. *Chapman*, 1914, 3 K. B. 275; 83 L. J. K. B. 1666; 111 L. T. Rep. 726; 79 J. P. 65. The threat having been made the only question was the appellant's intent. Two witnesses, Levy and Isba, were called on that point, and from their evidence the jury were entitled to draw the inference—as they did—that appellant's intention was to extort £30. He several times visited Mogford's public-house after the talk with Levy: the jury disbelieved that he did this and served the notice in the public interest. On the second count the evidence was that appellant said to Levy finally, "Very well: tell Mogford to send me £30 and I won't oppose his licence." Here there was ample evidence on both counts on which the jury were entitled to act.

C. a. v.

Appellant surrendered to his bail.

21 *November*.

The LORD CHIEF JUSTICE, after reviewing the facts in a written judgment, said:—

It was contended on behalf of the appellant that there was no evidence of a threat within the statute, because there was no evidence that the alleged conversation with Levy, in which the appellant expressed his intention of "getting" Mogford with the betting book, was ever communicated to Mogford, and because, even if it had been communicated, it was not a threat which would have affected the mind of a reasonable man. The answer to this contention is that the threat relied upon in the indictment is not the conversation with Levy, but the notice of the 26th January. The conversation with Levy was material as evidence of the intention with which that notice was given, and was relied upon to shew that the appellant in giving the notice was actuated by the intent to extort money from Mogford and not by a sense of public duty as he pretended.

It was also contended that the judge misdirected the jury in that he omitted to tell them that in order to constitute an offence against the statute it must be shewn that the appellant made such a threat as would affect the mind of a reasonable man and deprive him of his free volition, and cases such as *R.* v. *Tomlinson*, 1895, 1 Q. B. 706, and *R.* v. *Boyle*, 1914, 3 K. B. 339, were cited to us. Those were cases in which the question was whether the evidence disclosed a demand with menaces under the enactments now repre-

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sented by ss. 29 and 30 of the Larceny Act, 1916, and they have, in our opinion, no bearing upon the case before us. The nature of the threat required to constitute an offence against s. 31, the section with which we are concerned, is stated in the section itself. Under sub-s. (1) it is a threat to publish any libel, and under sub-s. (2) a threat to publish any matter. The word "threaten" in this section is equivalent to "expresses an intention to" or "says that he will," and the contention that there was a misdirection on the part of the learned judge therefore fails.

It was also contended that there was no evidence that the appellant "proposed to abstain" from publishing the matter in question, but that, on the contrary, the evidence established that the proposal that the appellant should abstain came from Mogford's side. This contention depends for its foundation upon the assumption that in order to come within the section the appellant must have been the first to broach the matter, and that no offence is committed by a blackmailer who, having made a threat to publish something, waits till his intended victim approaches him with a suggestion and then accepts the terms offered.

If the jury believed the evidence called by the prosecution, which they were entitled to do, they were at liberty to conclude that the appellant, being dissatisfied with the four guineas costs allowed by the magistrates in the assault case and being unable to get more out of his client Isba, conceived the idea of extorting money from Mogford by the use of the information that Mogford combined the occupations of publican and bookmaker, that having indicated his intention to Mogford's friend, Levy, he followed it up by serving the notice of 26th January, and when that notice had had its intended effect and brought Levy to see him on Mogford's behalf, he sent Levy to Mogford to tell him that if Mogford would send him a cheque for £30 he would withdraw his notice. This, in our opinion, amounts to a proposal by the appellant to abstain from publishing the matter referred to in the notice.

The next point raised was whether the notice of 26th January could be held in law to constitute a threat to publish any matter or thing. It was contended that the decision in *R.* v. *Yates*, 6 Cox, C. C. 441, shewed that an offer to prevent the giving of information to the Excise of a fraud upon the Revenue was not an offer to prevent the publication of any matter or thing within

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s. 3 of Lord Campbell's Act, 6 & 7 Vict. c. 96, which is in terms practically identical with those of the section now under consideration. It may be that in a case where a person who has in his possession information which would injure another, and who, without any threat having been made by him to publish it, is approached by that other with an offer of money for an undertaking not to publish it, commits no offence under this section by accepting the money and agreeing to the proposal that he should refrain from publishing the information. But it is unnecessary to discuss that question for it does not arise in this case, the appellant having already made a threat to publish the information by the service of the notice of 26th January before anyone approached the appellant at all.

The Court refused to allow sentence to run from the date of conviction, but included in the sentence the three weeks appellant had been actually imprisoned.

Appeal dismissed.

W. D. T.

Solicitors for Appellant—*Gibbs, White & King* for *Percy H. White*, Southend.

WILLIAM RICHARD STARKIE.

If counsel deliberately refrains from calling witnesses below the Court will be slow to give leave to call them on the appeal, and will only do so in exceptional circumstances.

On an indictment for attempting to procure abortion, to negative the defence of an innocent intent, evidence may be given tending to prove the attempt by other methods than that charged.

Ellis, 1910, 2 *K. B.* 746; 5 *Cr. App. R.* 41, *distinguished.*

Appeal against conviction on law and application for leave to call further evidence.

Appellant was convicted at the Central Criminal Court, on September 16th, after a five days' trial, of administering and supplying drugs with intent to procure miscarriage, and was sentenced by Mr. Justice Acton to nine months' imprisonment.

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Sir E. Marshall-Hall (with him, *R. Oliver*), for appellant, who was present, asked leave to call further evidence, on the ground that the course of the trial had taken appellant's counsel by surprise, and consequently they had not called certain professional witnesses.

Of the original eleven counts in the indictment, that for conspiracy to procure abortion was abandoned in the course of the trial by the Crown. Defendant was acquitted on every count charging instrumental abortion, and convicted only on the tenth and eleventh counts charging the administration and supplying of a noxious drug.

Now, on these two counts, I at the outset applied to make the prosecution elect whether they would proceed on the instrument counts or the drug counts. The learned judge himself asked counsel for the Crown whether it was worth while to include the drugs (*i.e.*, "Mrs. P.'s") case, and counsel replied that it was, because he wanted to put in a letter from Mrs. P. to defendant found in the latter's possession. As the judge said that it mattered little whether *this* charge was proceeded with or not, as he should allow defendant to be cross-examined to the letter, in that case, I, too, came to the conclusion that there was no object in a separate trial: like everyone else, defendant's counsel thought this charge was insignificant compared to the others: frankly, we made a mistake. As a matter of fact, Mrs. P., a respectable lady, gave evidence at the trial, being then advanced in pregnancy: she had taken the pills (indicted) and was quite well. That ergot, which they contained, is an abortive, is now, I understand, an exploded theory, and I did not think it worth while to rebut the very slight evidence of it given by one doctor *only*, both before the magistrate and at the trial. Indeed, it was only on the second day of the trial that notice was given us of *additional* evidence by that doctor (Donaldson) that the pills in question were abortive.

He referred to *Bond*, 1906, 2 K. B. 389 (Kennedy J., at 398); 75 L. J. K. B. 693; 70 J. P. 424; 21 Cox, C. C. 252; C. C. R.; and to *Frank Palm*, 4 Cr. App. R. 201, 253: 1910.

Clearly if these cases had been tried separately, the evidence in the instrument cases could not have been given in the "P." case. Yet the learned judge did not tell the jury "if you find him not guilty on the instrument count you must wipe all that evi-

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dence out of your minds," because it did not occur to anyone that such a verdict was possible.

Counsel then analysed at length the scientific evidence of the two specialists, both in their depositions and at the trial, to shew that on the count for the pills there was really no case to meet. He cited *W. Murphy*, 15 Cr. App. R. 181: 1921, "Conviction quashed in view of fresh evidence not available at the trial." He asked leave to call the scientific witnesses whose names he had handed in.

Sir R. Muir (with him, *E. Fulton*) in reply. Witnesses on this subject were available at the trial and were "deliberately" not called, and *Palm* (above) and *Weisz*, 15 Cr. App. R. 85: 1920, shewed that the Court would not call them. He quoted passages from the doctors' evidence at both Courts to shew that the defence had no reason whatever to suppose that the "P." case would not be tried, and had had and had taken abundant opportunity of cross-examining Dr. Donaldson on the abortive properties of the pills. Counsel was mistaken about the view the Crown took of the "P." case: Mrs. P.'s case was always regarded as an important part of the indictment. With regard to ergot, there is no known drug which will with certainty cause abortion.

Marshall-Hall in reply. The notice about Dr. Donaldson's additional evidence did not say that he would depose that ergot was an abortive. The Court should follow *H. Warren*, 14 Cr. App. R. 4: 1919: "The Court will allow evidence to be given which might have been given at the trial if it is satisfied that the omission was due to a misunderstanding on defendant's part."

The LORD CHIEF JUSTICE: The facts shew clearly that the prosecution relied on counts 10 and 11: there was a committal on them, and counsel for the Crown distinctly stated at the outset that he relied on Mrs. "P.'s" case. Counsel could not get the benefit of "the last word" below and then come to this Court to call witnesses who were "available" there. If counsel deliberately refrains from calling witnesses at the trial the Court will be slow to call them on the appeal, and will only do so in exceptional circumstances. It had not been shewn here that the persons he

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now wants to call were "not available" within the meaning of the cases. There had been no surprise.

Application for further evidence refused.

R. Oliver for appellant, who was present. The two grounds of appeal are: (1) That the "P." case ought not to have been tried with the other three cases. (2) The verdict, in view of the summing up and all the circumstances, is unsatisfactory and ought to be set aside.

(1) Before plea pleaded the defence objected to the "P." case being tried with the others. The Indictments Act has nothing to do with the matter, because it does not affect the common law rule that a defendant must not be embarrassed in his defence. That is for the discretion of the judge, subject to the revision of this Court. *Grizzard* or *Lockett,* 1914, 2 K. B. 720; 83 L. J. K. B. 1193; 78 J. P. 196; 24 Cox, C. C. 114; 30 T. L. R. 233; 9 Cr. App. R. 275. There is no question that the joinder was embarrassing. The true rule may be gathered from *Makin* v. *A.-G. of N.S.W.*, 1894, A. C. 57; 63 L. J. P. C. 41; 17 Cox, C. C. 704; 58 J. P. 148; 69 L. T. 778: P.C.; and *Ellis,* 1910, 2 K. B. 746; 102 L. T. 922; 74 J. P. 388; 28 T. L. R. 535; 5 Cr. App. R. 41: five judges. Except in the cases there mentioned, it is always unfair to join charges; charges must be either alternative or relevant to each other. Here there were two totally different and unconnected cases, irrelevant to each other, and the trial together of such charges must always be embarrassing because a jury is apt to compromise and acquit on one charge and convict on another. *Grizzard* shews that the discretion must be exercised "judicially."

[The LORD CHIEF JUSTICE: That means that this Court would review it in a case of manifest injustice.]

The learned judge at the trial said that he would put the prosecution to election if the evidence in the "P." case was not admissible in cross-examination in the other cases, but as he thought that it was admissible he tried all the cases together.

[The LORD CHIEF JUSTICE: The defence then waived its objection.]

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Yes. But the learned judge was wrong in law, for he could not admit the instrument cases in the "P." case, which was one of pills. Can it be that the mere form of a plea settles whether a defendant is to be put into this difficulty?

In *Ellis,* where the conviction was quashed, Bray J. cited *Fisher,* 1910, 1 K. B. 149; 79 L. J. K. B. 187; 74 J. P. 104; 3 Cr. App. R. 176: "If a man is charged with swindling in a *particular manner* his guilt cannot be proved by shewing that he also swindled *in some other manner.*" This was followed in *Baird,* 11 Cr. App. R. 186; 113 L. T. 608; 25 Cox, C. C. 86; 84 L. J. K. B. 1785: 1915, and repeatedly. In *A. Thompson,* 1918, 2 A. C. 221; 87 L. J. K. B. 478; 26 Cox, C. C. 189; 82 J. P. 145; 13 Cr. App. R. 261: H. L., Lord Sumner said: "In cases of coining, uttering, procuring abortion . . . such evidence is constantly and properly admitted," but "the issue so raised must be one to which the prejudicial evidence is relevant. . . . If a man could be convicted of a particular burglary, in which it was clear that no tools had been used at all, because at another place and time burglar's implements were found on his premises, it is difficult to see what limit could be put to the admissibility of general evidence of bad character." So here you cannot prove that a man is an abortioner by instruments because he is an abortioner by drugs. No case is known where on a charge of the one sort evidence of the offence by the other has been admitted: cf., *e.g., Bond,* 1906, 2 K. B. 389: C. C. R.; and *Palm* (above). It could not be said here that there was "system." The use of pills was not suggested in any of the other cases.

[THE LORD CHIEF JUSTICE: In the "P." case the only question is with what intent were the pills administered? The prosecution says that it only used the other three cases to shew the intent.]

(2) The verdict was a "compromise" verdict. The main criticism of the summing up is that the jury were not directed that in dealing with the "P." case they ought to disregard the evidence in the instrument cases: the defendant was entitled to this, for otherwise the cumulative effect of the other cases must inevitably influence them. In effect there were two indictments tried by the same jury. The only inference the jury could draw in the second

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from the first was that there was a criminal intent. See *Brereton*, 10 Cr. App. R. 201: 1914, where the conviction was quashed. With regard to Mrs. P.'s letter to appellant, if he had thought it referred to abortion, why should he keep it? (It was found on him.) Would it not have been damning?

[The LORD CHIEF JUSTICE: Could anyone read that letter and not understand it?]

The learned judge treated the letter as if it had been written by the appellant: his defence was that he did not understand it. With regard to judicial discretion, see *Curtis*, 9 Cr. App. R. 9; 29 T. L. R. 512: 1913, it can be reviewed here if it has been exercised on a wrong view of the law: *Grizzard*, above. The statement of Bankes J. that "it is not a matter of appeal even" if "it is wrongly exercised" must be qualified.

Sir R. Muir. The interpretation of *Grizzard* put forward is untenable: nor do the judges there say that if they had taken the opposite view they would have quashed. What does "exercising his discretion *judicially*" mean? If the judge says these counts are to be tried together, then the evidence in question becomes admissible: s. 4 of the Indictments Act and Rule 3 shew this: the framers of this statute had all the cases cited in mind.

[The LORD CHIEF JUSTICE: The rule that a judicial discretion cannot be reviewed must be qualified by some such words as "unless a manifest injustice is disclosed."]

Yes. See p. 260 in 9 Cr. App. R.: *James Andrew Thompson*, 1914, 2 K. B. 99; 83 L. J. K. B. 643; 24 Cox, C. C. 43; 9 Cr. App. R. 252: five judges.

[The LORD CHIEF JUSTICE: Beyond that this Court has no power: otherwise there would be no "discretion." So it is implied in *Crippen*, 1911, 1 K. B. at 158; 5 Cr. App. R. at 266-7, with regard to evidence in rebuttal.]

See also Indictments Rule 3: if the discretion were appealable there would be incessant appeals and much embarrassment. Here

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the discretion was rightly exercised: abortion is one of the recognised typical cases where collateral evidence is admitted to see what is really *intended*—especially in the case of a qualified medical man. In *Bond*, 1906, 2 K. B. 389: C. C. R., extraneous evidence was admitted, and in every reported case of the sort the question is of fact, not of law. Thus Rule 3 speaks of "the act of the same or of a similar character": *Baird*, above; 11 Cr. App. R. at 189. The question is, Do the similar transactions throw light on the intent? *Ellis* does not help the defence, for there there were two totally dissimilar frauds and cross-examination in one of the other was inadmissible: one threw no light on the other. In *Fisher*, too, above, there was not "the same method" of fraud. So *Palm* and *Thompson*, 13 Cr. App. R. at 81 (as above), and *Cooper*, 3 Cox, C. C. 547: 1849, where the illustration is from abortion. In the "P." case the only dispute was: With what intent? Is there not here "a reasonable inference of a systematic pursuit of the same criminal object," as Kennedy J. put it? *Bond*, at 405. That disposes of the suggestion that evidence of the use of instruments was not admissible in a case of pills: the fact that the jury did not accept that evidence does not make it inadmissible. One answer alone blurted out by appellant was enough to convict him. The question was, What fees he took: "It depends on the man who brought her." This was on the question of system.

Oliver in reply. The learned judge himself was in doubt whether he was right in law in permitting joinder. *Ellis* is undoubtedly in my favour, and so is *Fisher*.

[SANKEY J.: Is not *the offence* of abortion one? Can you split it into two?]

Can you split up the swindle in *Ellis* into two?

[The LORD CHIEF JUSTICE: *Ellis* was decided on the construction of a section in a statute.]

Yes, but on the same point and principle. I do not distinguish this case from *Ellis* and I crave it in aid. The phrase "a systematic pursuit of the same criminal object" is much too wide: it

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must be limited by "by the same means": *Ellis*, and the illustration of the burglar by Lord Sumner (above). There is no evidence that the pills were a preparation for instruments.

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The Court dismissed the appeal: the sentence to run from date of conviction.

Appeal dismissed.

H. C.

Solicitor for Appellant—*Freke Palmer.*

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The LORD CHIEF JUSTICE read the following judgment:—

In this case the appellant, a doctor of medicine, was convicted upon two counts—the 10th and 11th—of an indictment charging him with having administered or caused to be administered and with having supplied to a woman called Petersen certain poisons and noxious things with intent to procure her miscarriage. The earlier counts of the indictment contained charges against the appellant of having used an instrument or other means upon other women, three in number, with the like intent. He was tried upon those counts at the same time as upon counts 10 and 11, but was acquitted upon them.

The notice of appeal contains a number of points, but counsel, in opening it to us, confined himself to two, which he stated as follows:—(1) Ought the two counts relating to Petersen to have been tried with the others? and (2) ought the verdict, taken as a whole and with the summing up, to stand?

On the first of these points, the question raised by it was discussed at the trial upon the submission that whereas the charges relating to the other three women, being all charges of attempting to procure abortion by the use of instruments, could properly be tried together upon the authority of *R.* v. *Bond*, (1906) 2 K. B. 389, the charges relating to Petersen, being charges of attempting to procure abortion by means of drugs, were charges of an offence so different in character that it was not right to allow them to be gone into at the same time. The learned judge was of opinion that if the trial of the charges of using instruments upon the three women were separated from that of the charges of administering or causing to be administered drugs to the fourth, the evidence

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that the appellant administered drugs with intent to procure abortion in the fourth woman would still be admissible in the case relating to the other three in order to negative the defence that the instruments were used without any unlawful intent, whereupon counsel for the appellant withdrew his objection to the whole four cases being tried together—and tried together they were.

It was conceded that in a case where the prisoner is charged with attempting to procure abortion by the use of instruments, other cases where instruments were used for that purpose could be given in evidence. (*R.* v. *Bond.*) It was also conceded that in a case where drugs are charged as the means adopted, other cases of the administration of drugs are admissible. (*R.* v. *Palm*, 4 Cr. App. R. 253.) But it was contended before us that the learned judge should have held that the offence of attempting to procure a miscarriage by the use of instruments was so distinct and separate an offence from that of attempting to procure a miscarriage by the use of drugs that to allow evidence to be given of one of these offences upon the trial of a prisoner for the other was to offend against the principle enunciated in *R.* v. *Ellis*, (1910) 2 K. B. 746. In our opinion this contention is unsound.

R. v. *Ellis* was a decision upon s. 1, clause (f) of the Criminal Evidence Act, 1898, which enacts as follows: "A person charged and called as a witness in pursuance of this Act shall not be asked, and, if asked, shall not be required to answer, any question tending to shew that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless (1) the proof that he has committed or been convicted of such other offence is admissible evidence to shew that he is guilty of the offence wherewith he is then charged. . . ." The defendant was being tried upon a charge of having obtained money by false pretences from one Dickens by representing that he had paid for certain articles of vertu which he had sold to Dickens under an agreement that he was to be paid the cost price plus 10 per cent. profit, larger prices than he had in fact paid. The evidence upon which the prosecution relied to prove that the prices paid by Ellis were less than those which he represented to Dickens that he had paid consisted of entries in Ellis's books. The defence was that these entries represented only a part of the cost and not the whole of it, and Ellis deposed accordingly. He was thereupon cross-examined to shew that he

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had made false representations to Dickens in relation to other articles sold by him to Dickens not under the agreement, but altogether apart from it. Those representations were that certain pieces of china had been acquired by him as genuine old Dresden. The Court held that proof that Ellis had made such misrepresentations did not tend to prove what he had paid for the china sold under the agreement, but that the two offences were separate and unrelated, and that the statute therefore forbade the putting of the questions. No question arose in that case as to the intention with which the defendant had acted. If he had in fact paid only the prices which appeared in his books, his intention to defraud was obvious, and the value of the cross-examination to the prosecution lay in the fact that it indicated that the defendant was a fraudulent person who was not to be believed when he swore that he had in fact paid more for the goods than his books recorded.

The point in the present case was to shew that the appellant Starkie when he administered the pills to Petersen, as he admittedly did, or used the instruments on the other women, as was also admitted in two out of the three cases and was alleged in the third case, did so in the course of a proper exercise of his profession as a doctor, and not with the unlawful intent to procure the abortion of his patients.

These four young women consulted the appellant when they were "in trouble," having reason to think they were pregnant. They were all four subjected to a digital examination by him and were each treated either with instruments or with drugs or with both.

The pills administered contained "ergot," a drug commonly considered an abortifacient, but of uncertain operation, its effect in most cases being, as we understand, to produce spasmodic contractions of the muscles controlling the uterus and so expel the contents.

In our opinion evidence that the appellant administered drugs to one woman with intent to procure her abortion was admissible in support of a charge of having used an instrument with that intent upon another and *vice versâ*, the point being not to prove thereby that he used the instrument or administered the drug, but to rebut the contention of the defence that he did so innocently. The decision, therefore, of the learned judge to admit the evidence

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was correct, and that being so no question arises as to the propriety of all the counts in question having been tried together.

On the appellant's other point, the case was, in our opinion, most fully and carefully tried. If any criticism is possible upon the summing up, it is that it was if anything too favourable to the appellant. It is said that the verdict of the jury is a remarkable one in that having acquitted the appellant on three of the counts, they found him guilty on the fourth. It is possible to agree with the view that the verdict is remarkable, but not for the reason assigned.

This appeal must, therefore, be dismissed.

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JOHN KESTERTON BOSS.

Fresh evidence after a conviction of murder.

Application for leave to appeal against conviction and to call further evidence.

Applicant was convicted of the murder of a young woman on June 10th, 1921, at the Leicestershire Assizes, on October 27th, and was sentenced to death by Swift J. The defence was insanity.

Birkett for applicant, who was not present.

Hugo Young, K.C. (with him *R. O'Sullivan*), for the Crown. The only point calling for report is that at the trial no witness was available who could testify that appellant's mind had been seriously affected during his military service abroad in the war. One had now come forward voluntarily who had served in the same company and seen his demeanour and conduct and his subjection to epileptic "seizures." An account of what this witness, now in Court; could say had been duly filed with the Registrar.

The trial lasted from 10 a.m. to 9 p.m. and there were four women on the jury.

The LORD CHIEF JUSTICE: We shall follow *Lumb*, 7 Cr. App. R. 263: 1912 (and *Locke, ibid.* 71: 1911, and *Jesshope*, 5 Cr.

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App. R. 1: 1910, there cited), in sending the notes of the fresh evidence to the Home Secretary. It was undesirable that a mixed jury should find a verdict at such an hour after so long a day, and perhaps what was criticised as omissions from the learned judge's summing up was due to his desire to shorten the proceedings.

Application refused.

Solicitor for Applicant—*Fisher*, Ashby-de-la-Zouch.

H. C.

JOHN HENRY BOLTON.

Severity of sentence.

Appeal against sentence.

Appellant was convicted on two bankruptcy charges on October 20th, 1921, at the Lincolnshire (Holland) Sessions, and sentenced on each to two years' imprisonment with hard labour (to be concurrent).

Appellant in person.

Cracroft, for the Crown, was not instructed to argue in favour of the sentence, but to point out that appellant had had a bad record and that a pending Nottingham charge was not taken into account.

The LORD CHIEF JUSTICE: That is true; but a long time has elapsed since that record till the present charges, and he is sixty-one years of age. The sentence will be reduced to one year's imprisonment with hard labour.

Sentence reduced.

H. C.

FREDERICK JOHN COURT

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Severity of sentence.

Appellant was convicted, on October 19th, of obtaining money by false pretences and falsification of accounts, and was sentenced by the Deputy-Chairman of the Glamorganshire (Swansea) Sessions to six months' imprisonment with hard labour for each offence (but concurrent)

Hopkin Morris for appellant, who was not present, was heard on the facts.

Dallas Waters, for the Crown, was not called upon.

The Court declined to disturb the conviction, but thought that, in view of the facts that appellant was nearly forty-eight years of age and had hitherto borne a good character, and that possibly through ignorance he had not fully realised the criminality of his acts, reduced the sentence to six weeks' imprisonment with hard labour, to run from the date of conviction.

Sentence reduced.

Solicitor for Appellant—*A. H. Bullock,* Cardiff.

H. C.

ALFRED COLEMAN.

Conviction quashed for clear misdirection: House (*above, p.* 49) *confirmed.*

Appellant was convicted, on October 28th, 1921, at the Central Criminal Court, of having carnal knowledge of a female under sixteen, and was sentenced by the learned Commissioner to twelve months' imprisonment with hard labour. He appealed against his conviction.

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Appellant in person denied the charge (as he had done from the outset).

The Court called on *E. Fulton,* for the Crown, to point out any corroboration of the girl's story at all, or any caution on the want of it in the summing up, but the learned counsel was unable to do so to the satisfaction of the Court.

SANKEY J.: The girl's story was an extraordinary one in the incidents she related, and at first her father only threatened appellant with an action for damages. But quite apart from the absence of corroboration (not strictly required in law), there occurs again in the summing up that extraordinary proposition "Affirmation is stronger than negation," on which this Court expressed its opinion in *House's case* (above, p. 49) quite recently. That alone is enough to mislead a jury. It is quite true that the learned Commissioner's charge was quite favourable to defendant, but in a balanced case the least fault may tilt the scale the wrong way. We are forced to quash this conviction.

Conviction quashed.

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GEORGE HEATHCOTE.

When offences and their circumstances are of a similar nature, the Court tends to equalise sentences—even if there is no formal appeal against sentence.

The applicants were convicted, at the Central Criminal Court, after a trial on September 8th, 9th, 10th, 12th, 13th, 14th, 15th, 16th, 17th, 19th, 20th, 21st, 28th and 30th, on an indictment containing thirty-six counts, of obtaining money by false pretences, and the two former also of conspiracy to defraud (by what were known as "housing" frauds), and were sentenced, by the Recorder

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on September 30th, the two former to fifteen months' imprisonment with hard labour, and the two latter to three years' penal servitude. Three of them applied for leave to appeal against conviction and sentence; Hewitt only applied in respect of conviction.

Emmott and Hewitt were not present and were not represented by counsel.

Gordon Jones for Montriou, who was not present, appealed on a point of law, which had been placed in the Summary List. The committal for trial, on which the indictment is now founded, was bad owing to a violation of s. 17 of the Indictable Offences Act, 1848, 11 & 12 Vict. c. 42 (*a*). This appellant was only charged after the preliminary hearing against the other defendants had gone on for some time. When he was joined, the depositions of the witnesses already examined were read over and confirmed by them in the usual way: he did not cross-examine. But clearly he had no opportunity of cross-examining when they first deposed, and in conspiracy cases evidence against one conspirer is evidence against all others, and as the evidence of these witnesses may have influenced the learned magistrate's mind against the other defendants than Montriou, it may have induced him to commit Montriou for the conspiracy. The committal was, therefore, bad. In effect the Recorder refused, when asked, to quash the indictment on this ground.

E. Fulton for the Crown. As a matter of fact, of the ten witnesses referred to, only two were called at the trial because the "Bournemouth" counts were all dropped, and those two only gave evidence on other counts. And with regard to those two, the usual notice of additional evidence and of the substance of it was given the defendants before the trial. There was abundant evidence without the Bournemouth witnesses on which the magistrate could commit. Both offences are within the Vexatious Indictments Act (amended, 30 & 31 Vict. c. 35, s. 1), and no committal was necessary. The Indictments Act saved that Act, and it was quite open to the Crown to add new counts for offences within the Vexatious Indictments Act, on facts disclosed in the deposi-

(*a*) "The justice *shall*, in the presence of" the accused "who shall be at liberty to put questions to any witness, take the statement on oath."

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tions, without the leave of the Court. (*Clarke and Lyons*, 59 J. P. 248: 1895.) There are no proceedings for quashing a committal order: no case is known. There was a perfectly good committal for the false pretences.

Dunbar (with him *Elliot Eric Gorst*) for Heathcote, who was not present. Appellant was not defended below, and the Recorder regarded him and Hewitt—wrongly—as the ringleaders. (He dealt with the facts at length.) The sentence, at any rate, was too severe in view of Heathcote's shorter connection with the frauds.

Fulton for the Crown.

The LORD CHIEF JUSTICE: There was no ground for quashing the indictment against Montriou. Everything was regular according to the practice where one defendant is joined with others after the proceedings have gone some way. There was no violation of s. 17 of the Indictable Offences Act, 1848. The Bournemouth counts were withdrawn before the trial commenced and only two of the ten witnesses were called, and that on other than the Bournemouth facts. On all the counts tried there was a proper committal. No injustice of any sort had been done to this appellant.

The whole case is similar to the series of cases with which the Court is familiar, viz., that of the *National Alliance House Purchasing Co.* (above, pp. 45, 48), with which, indeed, appellant Hewitt, "the principal mind," as the Recorder said, had been once connected.

This Court is reluctant to interfere with sentences, but in view of its action in those other cases it will reduce the sentences here in each case to twelve months' imprisonment with hard labour, to run from the date of conviction.

Sentences reduced.

H. C.

Solicitor for *Montriou—Lionel Blackburn.*

Solicitor for *Heathcote—D. W. Money.*

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An invitation in writing, primâ facie *innocent, may be shewn by evidence to be an "attempt to procure the commission . . . of an act," &c., within s.* 11 *of* 48 *&* 49 *Vict. c.* 69, *The Criminal Law Amendment Act,* 1885.

On other points, Jones & Bowerbank, 1896, 1 *Q. B.* 4, Ransford, 13 *Cox, C. C.* 9, *and* H. Robinson, 11 *Cr. App. R.* 124, *followed.*

Appeal against conviction on a point of law.

Appellant was convicted, at the Lancaster Assizes, on October 29th, of attempting to procure the commission of an act of gross indecency, and was sentenced by Mr. Commissioner Finlay to nine months' imprisonment with hard labour.

Jordan for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The indictment was under s. 11 of the Criminal Law Amendment Act, 1885, 48 & 49 Vict. c. 69, which is: "Any male person who, in public or private, commits or is a party to the commission of or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person shall be guilty of a misdemeanour. . . ." The maximum punishment is two years' imprisonment with hard labour.

Appellant was a hospital orderly in the same employment as one Riley, who had been convicted of the offence in question with a youth named Price who lived at Blackpool, and undoubtedly he had given appellant Price's address. On July 31st appellant wrote to Price (A):—

"DEAR FRIEND,

"You must excuse me taking the liberty of writing you. My friend who met you last week on his way to I[sle] O[f] M[an] wishes me to see you. I am coming to Blackpool for a week. I will look out for you on Tuesday night about 7 o'clock where the boat starts for the I.O.M. at Fleetwood. Please don't forget. Don't be afraid to make yourself known to me. I shall be in uniform like he had on. He asked me to give you his best wishes, and I want just to have a chat with you while I am in Blackpool. Ernest [Riley] has just gone on a char-à-banc to the Ribble Valley. Well, don't forget Tuesday night at seven. I

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will be on the look out for you. If you are away at the time, I will drop you a P.C. with my address on in Blackpool.

"Yours very sincerely,
"C. W. COPE."

There was another letter (B) from appellant to Price apologising for not keeping the (above) appointment and asking for another, but it was not otherwise relevant. Neither letter reached Price, because they were both intercepted by his mother and handed by her to the police. Appellant was arrested on August 4th at the suggested meeting place.

Riley was called by the prosecution against the appellant, who was undefended and did not give evidence. Riley's evidence was that he had told appellant of his acquaintance with Price but not of the relations between them.

A letter from appellant to Riley, found on the latter, was objected to as evidence, on the ground that it was an attempt to shew general depravity of appellant, and the learned Commissioner only permitted one sentenee to be read against appellant, viz.: "I am jealous of the boy you picked out."

It is submitted that in law these facts disclose no attempt. It is further submitted that "procure" in s. 11 is used in the same sense as in the word "procuress," viz., an intermediary, not one who is himself a party: but it must be admitted that this view did not prevail in *Jones and Another*, 1896, 1 Q. B. 4; 65 L. J. M. C. 28; 18 Cox, C. C. 207; C. C. R. If that decision be correct, then an attempt to procure may be punished under s. 11 more severely than an attempt to commit the offence itself, which, as a common law misdemeanour, is only punishable by one year's imprisonment.

The case here relied on is *H. Robinson*, 1915, 2 K. B. 342; 84 L. J. K. B. 1149; 79 J. P. 303; 31 T. L. R. 313; 24 Cox, C. C. 726; 11 Cr. App. R. 124, which approved and followed *Eagleton*, Dearsley & P. 515; 24 L. J. M. C. 158; 3 C. L. R. 1145; 1 Jur. N. S. 945; 4 W. R. 17; 6 Cox, C. C. 559; 1855. The latter case shewed that before there could be a conviction for an attempt "the last act depending on himself [defendant]" must be done—which was by no means the case here, the letter itself being perfectly innocent. Both these and other cases shew that

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intent in defendant's mind, so long as no step—not a remote, but a proximate step—towards accomplishing it is taken, is not criminal. In *H. Robinson's* case this Court quashed a conviction where appellant admittedly had formed the fraudulent design of cheating underwriters by arranging a bogus burglary and a mock tying up of himself in his own shop as if by the pretended burglars, but the police, by discovering the fraud, had prevented him applying in fact for the sum in which he was insured: the Court held that "an attempt must be proved by act immediately (and not remotely) connected with the [proposed] crime."

[The LORD CHIEF JUSTICE referred to *Ransford*, 13 Cox, C. C. 9; 31 L. T. 488; C. C. R.: 1874.]

There, too, the letter was unread by the boy to whom it was addressed (with the object alleged in this case), and the conviction was affirmed: but that was a common law charge of inciting and soliciting to commit the offence—and the terms were unequivocal, not as here a statutory offence. Assume that the letter here did shew an evil intent, *Eagleton* and *Robinson* shew that that is not enough.

Goodman Roberts for the Crown. The letter must be read in the light of the letter from appellant to Riley and that of his statement to the police officer on arrest, which was: " . . . . . Riley told me they [Price and he] laid down together on the grass: they put their arms round each other. Riley said he was with him all day. They had had a good time together, and if I would write him I would have a good time with Price."

"Procure" here is not used in the sense in which an intermediary is said to "procure" a female (*e.g.*, in s. 2 of the Act in question). Here it means causing the commission of the offence, and *Ransford* shews that the attempt to induce to it is enough.

[The LORD CHIEF JUSTICE: But this letter is colourless, even consistent, perhaps, with a design to dissuade the youth from his practices.]

The letter says: "He [Riley] asked me to give you his best wishes." Appellant was introducing himself as Riley's friend

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with no indication that Riley regretted his conduct. That and the remark about Blackpool would have shewn Price the real character of Cope's intentions. The case is covered by *Ransford*.

I accept Stephen J.'s definition of "attempt" (*Digest*, 5th ed. Art. 50) cited to the Court and apparently accepted in *H Robinson*. In that case, no machinery of any sort to demand the money had been set in motion: that differentiates it from this case, where the first overt act was taken—as the jury have found—with a guilty intent, and that is enough.

[The LORD CHIEF JUSTICE: Is the letter the attempt?]

So the jury found.

[The LORD CHIEF JUSTICE: Have you any authority for Stephen's further dictum: "The offence of attempting to commit a crime may be committed in cases in which the offender voluntarily desists from the actual commission of the crime itself"?]

No, except what he there cites: *Taylor*, 1 F. & F. 511: 1859

[The LORD CHIEF JUSTICE: Can it be said that once you have intended to commit a crime you cannot voluntarily desist without attempting to commit the crime?]

No, it cannot be said; but all I have to shew is that a guilty intent was formed and a movement made to execute it. (He mentioned *Banks*, 12 Cox, C. C. 393: 1873.)

Jordan in reply. The charge here is not an attempt *to incite*, but a substantive offence under a statute: *an attempt to procure*. *Ransford* was an *attempt to incite*. The second letter of August 4th was far removed from any wrong intention—even if any was shewn by the letter of July 31st. Why could there not be, even on that assumption, a *locus pœnitentiæ?* The Court in *Robinson* did not accept the definition in Stephen's Digest.

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Trevethin L.C.J.

The LORD CHIEF JUSTICE delivered a written judgment. After reciting the facts his Lordship said:—

The appellant was convicted of an offence against s. 11 of the Criminal Law Amendment Act, 1885.

The evidence was as follows:—On the 9th July one Riley met a boy of 17 called Price at Blackpool and there committed an act of gross indecency with him on the 10th. Riley was an orderly at a hospital near Manchester, and returned thither soon after the 10th July, having taken Price's name and address. When he got back Riley told the appellant, who was also an orderly at the hospital, of his meeting with Price, and gave him his name and address. The appellant was about to go to Blackpool on a holiday, and towards the end of July he wrote to Price a letter (A) as follows:—(See above). This letter he followed up about the 1st August by another (B) which reads thus:—(See above). Neither letter was received by Price, they being intercepted by Price's mother.

The appellant made a statement to the police in which he admitted that Riley had told him of his conduct with Price and that his (the appellant's) intention was to enjoy himself with Price in the same manner as Riley had done.

Three points were taken before us:—

(i.) That upon its true construction sect. 11 of the Act does not apply to an attempt by a man to procure the commission of an act of indecency with himself. The opposite was decided by the Court for Crown Cases Reserved in *R.* v. *Jones and Bowerbank*, 1896, 1 Q. B. 4, and we entirely agree with that decision.

(ii.) That it is necessary in order that the writing of a letter should constitute an attempt that the letter should have been received and read by the addressee. On this point also the law has been declared and in a sense contrary to the appellant's contention. See *R.* v. *Ransford*, 13 Cox, C. C. 9; and *R.* v. *Banks*, 12 Cox, C. C. 393.

(iii.) That in any event the letters in question did not afford evidence of an attempt to procure the commission of an act of indecency but that they were in themselves colourless and at most only an act preliminary to the commission of an offence. The question how far back along a chain of acts leading up to the commission of a crime there comes the dividing line between those acts which are mere preparation for the commission of a crime and

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those which amount to an attempt to commit it is not always easy to answer. The law on the subject has been considered in a number of cases and a guiding principle enunciated in *R.* v. *Robinson*, 1915, 2 K. B. 342, where the Lord Chief Justice pointed out that the difficulty lies rather in the application of the principle to the facts of a particular case than in discovering what that principle is. It is clear that in a case like the present, if the letters contained an invitation in undisguised terms to commit an act of gross indecency, they would be enough to support a conviction for an attempt to do so (*R.* v. *Ransford*). For though there the charge was one of "inciting," and here it is that of "attempting to procure," this is immaterial, for the letters clearly contemplate participation by the writer in the result of the meeting.

It is also clear that if it were shewn that letters, on the face of them innocent, in fact contained a code known to their addressee by means of which he would receive through the apparently innocent letter a plain invitation to commit such an act the letters would constitute an attempt to procure the commission of the crime. The letters in the present case obviously do not contain an undisguised invitation nor is a code suggested, but it is said that they do contain terms which would have conveyed the invitation to the mind of their intended recipient as unmistakeably as if it had been set out in express terms and that the jury have by convicting found that this is so.

We consider that in order to see whether the letters do contain such terms that Price would see in them an invitation to commit an act of gross indecency with the appellant the surrounding circumstances may and should be examined. See *R.* v. *Roberts*, Dearsley and P., C. C. 539: 1855.

Price was a boy known to the appellant to have committed such an act with Riley. The appellant writes to Price reminding him of his meeting with Riley, sending Riley's good wishes, telling him not to be afraid to make himself known to the appellant, saying that the appellant is going to stay a week in Blackpool and is anxious to meet him. What would such a boy as Price was known to the appellant to be understand from such a letter? We think that there was enough to entitle the jury to find that Price would have read into it an invitation to repeat with the appellant the offence which he had committed with Riley, and therefore that the sending of the letters was an attempt to procure Price to

commit the offence and that the conviction should stand. This is more clearly the case in letter A than in letter B. For B may only have intended to procure a meeting at which "to arrange for a later appointment" at a more suitable place, in which case it might not satisfy Baron Parke's requirements that an attempt "must be an act of such a nature that nothing further is necessary to be done by the defendant in order to commit the offence in question": *R.* v. ***Eagleton,*** D. & P. 515.

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Letter A interposes no such delay. It is in such terms that to an understanding mind (which the jury must have found) it would effect the criminal consent desired and therefore be an attempt to "procure the commission of an act of gross indecency."

Appeal dismissed.

JOHN MILLICHAMP.

7 December.

When the sole defence is an alibi, *identification by a single witness must be conducted with great care and the summing up must deal carefully with the facts of the identification.*

Appeal against conviction.

Appellant was convicted, at the Birmingham Sessions, on October 4th, of burglary and of stealing two overcoats, and was sentenced by the Recorder to eight months' imprisonment with hard labour.

C. K. Tatham for the appellant (under s. 10 of the Criminal Appeal Act), who was present. Appellant was indicted with one Field, who pleaded guilty and was a witness for appellant, who was arrested eight days after his co-defendant. His defence was from the outset an *alibi,* and Field swore at the trial that appellant was not the man who committed the crime with him. Appellant was undefended, and voluntarily admitted in his evidence that he had been previously convicted. The sole evidence against appellant was that of Mr. Sheldon, the prosecutor, who at 4 a.m. (summer time) on 16-17th July surprised Field and another man in his backyard. Both ran away. Field was captured, but Mr. Sheldon never saw his companion face to face. He noticed, however, that he ran in rather an odd way. A week later appellant

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with six other men were put up for identification by Sheldon at the local lock-up, a small room. He did not pick him out when they faced him, but when, at prosecutor's request, they turned round, he picked out appellant because, he said, "his figure corresponded with that of the second burglar." No police officer present on that occasion was called, and there was no test whatever of appellant's running—the one thing that prosecutor had seen, though perhaps even that was at a distance of thirty-five yards. What was more remarkable still was that prosecutor had deposed that he thought appellant had a twisted foot: yet the latter was never even asked whether he had—which could have been easily tested. At the trial appellant offered to make any trial of walking, &c. that was suggested, but the offer was not accepted. The identification was thoroughly unsatisfactory, but was not properly criticised in the summing up, a defect especially marked where defendant had ignorantly admitted a previous conviction in 1912.

Appellant now asked leave to call a witness (in attendance), a youth, one of five or six, who, he said, had seen him fishing some miles from the scene of the burglary on the night it took place and that he stayed there all night. He had not called any of them because he thought that he and Field would, between them, establish the *alibi* and that they might object to come.

Goodman Roberts for the Crown. There was quite sufficient identification if the jury, who saw his build, movements, &c., were satisfied. The Recorder had acted in appellant's interest in not referring again to his previous conviction.

The LORD CHIEF JUSTICE: This Court is slow to reverse a jury's verdict; but here we must. Mr. Sheldon's opportunities for identification were too slight, and there was evidence in appellant's favour. No proper test was taken at the police station and the officer in charge there was not called, nor was there the slightest attempt to prove that appellant had a twisted foot, and his own offer to exhibit his feet or to run or walk was not accepted.

Conviction quashed.

H. C.

ARTHUR AARON MASSEY.

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13 *December.*

Trevethin L.C.J.
Sankey J.
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Sentence increased.

Appeal against sentence by leave of the Court.

The conviction was at Chester Assizes, on October 25th, for uttering a forged document. McCardie J. passed sentence of twelve months' imprisonment with hard labour.

Appellant in person.

Trevor Wright for the Crown.

Appellant pretended to go through a bogus marriage at a registry office in Stockport in January, 1914, with a servant girl, and when she insisted on having "marriage lines" got someone to forge a certificate. After he had had five children by her, when his wife appeared in 1921, he told the girl that the paper he had given her was that of his real wife altered, and that she "and her bastards could clear out."

In view of his cruelty, the Court increased the term of sentence to fifteen months—sentence to run from the date of conviction.

Sentence increased.

H. C.

DAVID HARGRIEVE BRAIDWOOD

19 *December.*

Severity of sentence for bigamy.

Appellant pleaded guilty to bigamy, at the Central Criminal Court, on October 20th, and was sentenced by the Recorder to eighteen months' imprisonment with hard labour. He appealed against this sentence by leave of the Court, and applied to call further evidence.

Appellant in person. The Recorder had been misled into believing that appellant had decoyed the young woman, Florence

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Windsor, from her home, and after living with her had gone through the bigamous marriage with her; that it was, in effect, a case of "rape under a promise of marriage." This was not the case.

Sir R. Muir, for the Crown, stated that by agreement with appellant Florence Windsor gave false evidence about the relations between them, stating that there had been no intimacy before the bigamous marriage. This it was which misled the Recorder. The Court called *Florence Windsor*, who was examined by *Muir* and cross-examined by appellant, who also made a statement, denying many of her allegations.

The LORD CHIEF JUSTICE: Into the merits of the relations between these two persons as disclosed to-day this Court cannot enter. But it is clear from the girl's evidence that it was she who, in view of her condition, urged him to marry her, believing, it may be, that he was a single man. The Recorder, therefore, was misled on this point, and the term would be reduced to twelve months.

Sentence reduced.

H. C.

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21 *December.*

JOHN WILLIAM GOTT.

The rule of the Court is to refuse bail pending appeal.

Applicant was convicted of blasphemy, at the Central Criminal Court, on December 9th (a jury having disagreed on December 7th), and was sentenced by Avory, J., to nine months' imprisonment with hard labour. This was an application (to the Court, instead of a single judge, as it was the last day of term) for bail pending appeal.

Harold Murphy, for the applicant, who was not present. Applicant is in bad health: he can find good sureties and will give an undertaking not to publish the paper in question pending appeal. One jury disagreed about his guilt.

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JOHN WILLIAM GOTT.

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The LORD CHIEF JUSTICE: This is a class of case in which bail is dangerous. We must follow *E. Gordon,* 7 Cr. App. R. 182: 1912. In fact, this is *a fortiori:* if we granted this application, we could never consistently refuse bail.

Application refused.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ROCHE, AND MR. JUSTICE BRANSON.

JOHN WILLIAM GOTT.

1922
16 *January.*

The offence of blasphemy may be committed by written as well as by spoken words.

The essence of the crime consists in the publication of words concerning the Christian religion so scurrilous and offensive as to pass the limits of decent controversy and to be calculated to outrage the feelings of any sympathizer with Christianity. In considering whether these limits have been passed the circumstances in which the words are published should be taken into account. The limits of decent controversy would certainly be passed if the circumstances in which the words were published were such that the publication was likely to lead to a breach of the peace.

Appeal against conviction on law, and application for leave to appeal against sentence.

Appellant was recommended to mercy on the ground that he was not fully alive to the gravity of the offence. He had, however, been three times previously convicted of the same offence.

Sir H Curtis Bennett, K.C. (with him, *Harold Murphy*), for the appellant, who was not present. It is not submitted that there was no case to go to the jury. But the evidence merely shewed that appellant was selling in Stratford Broadway, on November 12th, two papers, at 2*d.* each, entitled respectively "The Rib Tickler" and "The Liberator." The latter contained two pamphlets, entitled respectively "Rib Ticklers, or Questions for Parsons," and "God and Gott." One man in the crowd said:

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"You ought to be ashamed of yourself": one woman said "Disgusting, disgusting!" Nothing further occurred.

It is not suggested that the language used in the pamphlets was desirable, or justifiable, but that it was the language of an ignorant man, used to enforce arguments against the Christian faith, which he would not have used had he been better educated. It is submitted that the learned judge misdirected the jury in three particulars:—

(1) That the alleged libels were calculated to outrage a person of strong religious feelings and so to provoke a possible breach of the peace. This is an improper test. The proper test is whether they would outrage an average man.

(2) That it made no difference whether blasphemous matter was spoken, or (as here) printed. This is contrary to what may be inferred from the ruling of Phillimore J. in *Boulter*, 72 J. P. at 189: 1908. This ruling was followed by Horridge J. in an unreported case.

(3) That persons buying the papers would not know the probable nature of the contents. This is contrary to the evidence. One of the papers announced on the cover that appellant had been prosecuted for blasphemy.

The learned judge also omitted to direct the jury that, if they had any doubt, the accused must have the benefit of it; in other words, that the *onus* of proof lay on the prosecution. This usual direction was of the more importance when another jury had disagreed, and its omission amounted to non-direction.

The imposition of hard labour was excessive having regard to the recommendation of the jury, and also to medical testimony about appellant's health.

The following passages are from AVORY J.'s summing up:—

"The words 'lead to a breach of the peace' do not mean and do not involve even the idea that there must be evidence of the peace having been broken at the time when the publication actually takes place. The principle is exactly the same as in the case of an ordinary defamatory libel upon an individual . . . . the only ground upon which it has been laid down that it may be made the subject of an indictment is that the publication of a defamatory libel upon an individual is calculated to provoke a breach of the

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peace. You must put it to yourself, supposing you received by post some abominable libel upon yourself, not written anonymously as so many of them are, generally, what is your first instinct? Is not the instinct of every man who is worthy the name of a man—the instinct is to thrash the man or the woman who has written a libel on him? and that is why the law says that it is calculated to provoke a breach of the peace. . . . . What you have to ask yourselves in this case is whether these words which are published, these matters which are published in these two pamphlets are, in your opinion, indecent and offensive attacks on Christianity or the Scriptures or sacred persons or objects, calculated to outrage the feelings of the general body of the community and so lead, possibly—not inevitably, but so lead, possibly, to a breach of the peace. You must ask yourselves if a person of strong religious feelings had stopped to read this pamphlet whether his instinct might not have been to go up to the man who was selling it and give him a thrashing, or, at all events, to use such language to him that a breach of the peace might be likely to be occasioned, because that would be quite sufficient to satisfy this definition. . . . ."

". . . . You must not turn your attention to one passage only but look at the whole of these passages . . . . and ask yourselves whether, looked at as a whole, this is anything more than vilification, ridicule, or irreverence of the Christian religion and of the Scriptures. Is it in any sense argument? Is it in any sense within the bounds of decent controversy on religious subjects? Is it anything more than . . . . vilification of sacred subjects and contemptuous—contemptuous and insulting?"

Ronald Powell (with him, *Sir Richard Muir*) for the respondent, the Commissioner of Police, was not called on.

The LORD CHIEF JUSTICE: The appellant has been three times before convicted of publishing blasphemous libels, and he had ample knowledge of what he was doing. It does not require a person of strong religious feelings to be outraged by a description of Jesus Christ entering Jerusalem "like a circus clown on the back of two donkeys." There are other passages in the pamphlets equally offensive to anyone in sympathy with the Christian religion, whether he be a strong Christian, or a lukewarm

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Christian, or merely a person sympathizing with their ideals. Such a person might be provoked to a breach of the peace.

There was no misdirection in the summing up. With regard to the alleged non-direction, this is a case where there was no doubt about the facts, and it would have been idle to direct the jury that the accused must have the benefit of any doubt. This point cannot, therefore, interfere with the conviction. The sentence is not too long for a person who has had three previous convictions. If the appellant is in ill-health, the hard labour will not be enforced so as to injure him. In fact, a sentence of hard labour will cause the prison authorities to pay even greater attention to his health than they would otherwise do. The application that the sentence in this case should run from the date of conviction must be refused. The general rule of this Court is that the intervening period should not count unless leave to appeal has been obtained.

Appeal dismissed.

Solicitor for the Appellant—*Charlton Hubbard.*

Solicitors for the Respondent—*Wontner & Sons.*

W. D. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SANKEY, AND MR. JUSTICE BRANSON.

JOHN JOSEPH WILCOCK.

1921
12 *December.*

If there is a proper allegation in an indictment that prisoner is a habitual criminal, his confession of a previous conviction as such is tantamount to a plea of guilty, and the informality of his not pleading is cured by the proviso to s. 4 of the Criminal Appeal Act.

The Court disapproves of any laxity in practice or procedure in the prosecution of a prisoner alleged to be a habitual criminal.

Appellant was convicted, on November 18th, at Stafford Assizes, on an indictment for rape and robbery with violence, and was sentenced by Roche J. to five years' penal servitude and two years' penal servitude and twenty-five lashes with "the cat" respectively: he pleaded guilty on count 1 of another indictment to unlawful wounding (plea accepted) and larceny, and was sentenced to three years' penal servitude for each offence—all the terms to be concurrent. He also pleaded guilty to the other two counts in the second indictment.

After the verdict of guilty, the deputy clerk of assize said: "There is another charge against you of having been convicted at quarter sessions on the 12th April, 1915, of burglary and being a habitual criminal. Were you so convicted?" To which appellant replied, "Yes, I was." He was further sentenced to ten years' preventive detention.

Ronald Powell for appellant (under s. 10 of the Criminal Appeal Act), who was present. I defended him on his trial. This appeal is permitted by s. 11 of the Prevention of Crime Act, 1908, and deals only with the sentence of preventive detention.

[The Court pointed out that appellant's notice covered all the sentences: in fact he asked for a shorter term and more "cat."]

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JOHN JOSEPH WILCOCK.

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I did not draw that notice, and I submit that this appeal lies against preventive detention only.

Here the statutory procedure was not followed. Up to what ought to have been arraignment everything, including the notice to defendant (which, however, was not proved at the trial), was in order. At that point the accused, having been convicted of the primary offence, ought to have been asked to plead formally to the allegation that he was a habitual criminal. Section 10 (1), (2), (4), provides how such a trial is to be conducted and what must be proved. It is not enough to get from the prisoner the fact that he has been previously convicted as a habitual criminal: there must be a plea as well. So Rule 11 under the Indictments Act, 1915: "Any charge of a previous conviction of an offence or of being a habitual criminal . . . . shall be charged at the end of the indictment by means of a statement—in the case of a previous conviction . . . . in the case of a habitual criminal . . . . that the offender is a habitual criminal." This mandatory rule displaced s. 10 (3) of the Prevention of Crime Act, which was permissive—"shall be sufficient"—and so s. 10 (3) was repealed (by the Indictments Act). *Charles Smith*, 1910, 1 K. B. 17; 101 L. T. 816; 74 J. P. 13; 26 T. L. R. 23; 79 L. J. K. B. 1; 3 Cr. App. R. 40, is not really against me, because in 1909 the law was that of the Crime Act, but now it is in the Indictments Rule 11. The prisoner was perfectly entitled after answering the clerk's question to plead not guilty, and then the Crown would have been put to the strict proof required by s. 10 and they might not have discharged that burden. Therefore, this case is like that of *Crane*, 1921, 2 A. C. 299; 37 T. L. R. 788; 65 S. J. 642; 15 Cr. App. R. 183; H. L.: there was no indictment and the proceedings were void *ab initio*. Further, the prisoner was never asked if he had been sentenced to preventive detention, an additional fact required under Prevention of Crimes Act, s. 10 (2) (b).

[The LORD CHIEF JUSTICE: Where is "the substantial miscarriage of justice"?]

If this appeal arises under s. 4 of the Criminal Appeal Act, then as Lord Sumner said in *Crane*, "as there was a miscarriage of given by essential steps in criminal procedure—the Court was

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12 *December.*

JOHN JOSEPH WILCOCK.

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bound to allow his appeal in the sense of quashing a *de facto* conviction which was in law a nullity." Lord Parmoor, *ibid.*: "A trial void *ab initio* cannot result either in acquittal or conviction. . . . . Crane, therefore, fails to bring himself under the protection of s. 4." If s. 4 does not apply to this appeal, the proviso cannot apply.

[SANKEY J.: Does s. 10 (2) apply to an admission of being a habitual criminal?]

Yes, the status of a habitual criminal is statutory and defined by that section.

Sub-s. (4) implies that unless there is a plea of guilty there must be the verdict of a jury: there cannot be any other admission in a criminal case.

[SANKEY J. referred to *Bates*, 1911, 1 K. B. 964; 6 Cr. App. R. 153, where a conviction was quashed because there had been no *fiat* for the prosecution as required by statute.]

So here a proper arraignment was required as a condition precedent for conviction as a habitual criminal.

J. H. Thorpe for the Crown. The appeal here, is against the whole sentence. Rule 23 of the Criminal Appeal Rules has not been complied with if appellant is abandoning any part of his notice of appeal. *Charles Smith* (above) is decisive of this case in favour of the Crown. Nor is enough shewn here to constitute a miscarriage of justice. Undoubtedly this Court has power, on an appeal against sentence, to increase term of sentence or any part of it, and though the Director of Public Prosecutions never presses for any greater severity, he does in this case if the Court should think that the conviction as a habitual criminal was wrongly obtained.

Powell, in reply, referred to s. 5 of the Criminal Appeal Act: "may either affirm the sentence . . . or pass such sentence, &c.," *i.e.*, the singular contemplates a case where one sentence only was imposed.

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[BRANSON J.: The Interpretation Act puts that right: the singular here implies the plural.]

The sentence in respect of the substantive offences should not be increased, because penal servitude is a punishment, but preventive detention is not awarded with that object.

[The LORD CHIEF JUSTICE: I do not know why penal servitude has been required to precede preventive detention.]

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See p. 102.

H. C.

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19 *December.*

FREDERICK HARRIS AND WILLIAM EDWARDS.

The statutory notice to a prisoner alleged to be a habitual criminal must set out with particularity the facts which it is intended to prove.

Appellants were jointly convicted on October 21st, at the Central Criminal Court, of making counterfeit coin, and were each sentenced, by the Common Serjeant, to seven years' penal servitude and five years' preventive detention.

Myles Elliot for the appellants (under s. 10 of the Criminal Appeal Act), who were present. The appeal is only against the term of preventive detention. Evidence was admitted that appellant was an associate of convicted criminals, though there was no mention of this suggestion in the statutory notice: if it was one of the "other grounds" it ought to have been definitely set out: *Nielson*, 78 J. P. 158; 30 T. L. R. 125; 9 Cr. App. R. 218: 1913: *Stockdale*, 11 Cr. App. R. 108: 1915; *Turner*, 1910, 1 K. B. 346; 79 L. J. K. B. 176; 74 J. P. 81; 26 T. L. R. 162; 3 Cr. App. R. 103; *Waller*, 1910, 1 K. B. 364; 79 L. J. K. B. 184; 74 J. P. 81; 26 T. L. R. 142; 3 Cr. App. R. 213. Moreover, the interval since his last release, nearly eight months, was entirely ignored.

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FREDERICK HARRIS AND WILLIAM EDWARDS.

Trevethin L.C J. Sankey J. Branson J.

Dummett, for the Crown, admitted the irregularity, but contended that as there was no miscarriage of justice the proviso to s. 4 of the Criminal Appeal Act might apply. He cited *Bagot,* 4 Cr. App. R. 67; 26 T. L. R. 266; 74 J. P. 213: 1910; *Heron,* 9 Cr. App. R. 29: 1913; *Fowler,* 8 Cr. App. R. 249; 77 J. P. 379; 29 T. L. R. 422: 1913, had not been followed by this Court.

C. a. v.

See p. 101.

Convictions as habitual criminals quashed.

ALFRED JONES.

The statutory notice to a prisoner alleged to be a habitual criminal must set out with particularity all the facts which it is intended to prove.

Appellant was convicted, on October 28th, at the Central Criminal Court, of housebreaking, and sentenced by Mr. Commissioner Atherley-Jones to three years' penal servitude and five years' preventive detention.

M. Elliot for the appellant (under s. 10 of the Criminal Appeal Act), who was not present, took exactly the same point as in *Harris and Edwards* (above). The interval here was from May 13th to August 18th. He cited *Maxfield,* 7 Cr. App. R. 230; 28 T. L. R. 404: 1912.

R. D. Ross, for the Crown, admitted the irregularity, but relied on the proviso to s. 4, and cited *E. Marshall,* 5 Cr. App. R.25: 1910.

C. a. v.

See p. 100.

Conviction as habitual criminal quashed.

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19 *December.*

Trevethin L.C.J.
Sankey J.
Branson J.

RICHARD WILKINS.

The statutory procedure on the trial of the allegation of being a habitual criminal must be strictly followed.

Appellant pleaded guilty, at the Gloucester Assizes, on October 27th, to shopbreaking, and was convicted of being a habitual criminal, and was sentenced by Roche, J., to five years' penal servitude. He appealed against the conviction as a habitual criminal.

Appellant was not present and was not represented.

H. Hardy, for the Crown, stated that the arraignment as a habitual criminal was due to a mistake by the police: the consent of the Director of Public Prosecutions had not been obtained and no notice had been served on appellant. But his record was very bad and he was already a "habitual criminal." This conviction had not affected the primary sentence which, at appellant's wish, took into account two charges for which warrants had been issued against him. The interval in his case, however, was September, 1916, to October, 1920.

C. a. v.

See p. 99.

Conviction as habitual criminal quashed.

Observations on the practice and procedure on the trial of the allegation of being a habitual criminal.

Any attempt by such an accused person to lead an honest life after discharge from prison should be put to the jury.

Observations on the discretion of the Court in the application of the proviso to s. 4 (1) *of the Criminal Appeal Act.*

1922
13 *February.*

The Lord Chief Justice read the following judgment:—

As in some of these cases there have been errors in practice and procedure which necessitate quashing the convictions, the Court thinks it advisable to re-state the law on these points, and then to deal with each case individually.

It will be observed that by the Prevention of Crime Act, 1908, a person can only be convicted of being a habitual criminal where, after having been convicted on indictment of a crime, the offender

admits that he is, or is found by the jury to be a habitual criminal, and the Court passes a sentence of penal servitude in respect of the crime for which he has been so convicted. As far as the verdict of the jury is concerned, a person cannot be found to be a habitual criminal until after proper procedure the jury find either—

(a) That since the age of 16 years he has at least three times previously to the commission of the crime charged in the indictment been convicted of a crime, and that he is leading persistently a dishonest or criminal life; or

(b) That he has on such a previous conviction been found to be a habitual criminal and sentenced to preventive detention.

The provisions of the Act about practice and procedure are peculiar, and a due appreciation of, and a strict compliance with them are necessary. Most of the points relating thereto will be found decided in *R.* v. *Turner*, 1910, 1 K. B. 346; 3 Cr. App. R. 103; but we now proceed to deal with those arising in the cases before us in respect of proceedings (1) Before trial; (2) During trial; (3) After conviction.

(1) *Proceedings before trial.*—There are two conditions precedent—

(a) The consent of the Director of Public Prosecutions has to be given.

(b) Seven days' notice has to be given to the proper officer of the Court by which the offender is to be tried, and to the offender himself, that it is intended to insert such charge, and the notice to the offender must specify the previous convictions and the other grounds upon which it is intended to found the charge.

These two conditions are of the utmost importance, and unless proper notice has been given no valid trial can take place.

The notice itself should give with particularity not only the convictions, but the other grounds upon which it is intended to found the charge. The latter must refer specifically to the facts, but not the evidence, upon which the prosecution intend to rely for proof that the offender is leading persistently a dishonest or criminal life. It is not sufficient to state these facts generally, they must be set out in detail.

The Court has repeatedly laid down these principles, and of

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the many reported cases three may be cited as examples: *R.* v. *Marshall,* 8 Cr. App. R. 20: 1912; *R.* v. *Neilson,* 9 Cr. App. R. 218: 1913; *R.* v. *Russell,* 12 Cr. App. R. 271: 1917.

(2) *Proceedings during trial.*—The indictment should be framed to show clearly that the person is charged with being a habitual criminal (see rule 11 under the Indictments Act, 1915), and after verdict, but before sentence at the trial on the primary offence, the charge of being a habitual criminal should be clearly put to the prisoner for him to plead to. *R.* v. *Walker,* 5 Cr. App. R. 231: 1910. Care should be taken during the trial that evidence is not given against the offender unless due notice of the facts has been already given to him.

Counsel for the prosecution should especially be careful to observe the grounds alleged in the notice of the Director of Public Prosecutions, and to see that his witnesses do not run on and give evidence of facts not set out in such notice. A general question to a police officer, "What do you know about the prisoner?" may let in evidence of facts not so set out, and lead to the quashing of the conviction.

For example, it is not permissible to prove any conviction unless it has been set out in the notice given before trial. Nor again is it permissible to prove conduct which has not formed the subject of a conviction, *e.g.*, conduct of a dishonest character, unless the facts relating thereto have been set out in such notice. If it is intended to prove that the offender has been associating with thieves, that fact must have been set out in the notice. *R.* v. *Turner,* 1910, 1 K. B. 346; 3 Cr. App. R. 603; *R.* v. *Summers,* 10 Cr. App. R. 11: 1914; *R.* v. *Maxfield,* 7 Cr. App. R. 230: 1914; *R.* v. *Stockdale,* 11 Cr. App. R. 108: 1915. Unless these facts have been included therein, proof cannot be given, although by sub-s. 5 of s. 10 the ordinary rule of evidence is relaxed, and evidence of character and repute "may, if the Court thinks fit, be admitted as evidence on the question whether the accused is or is not leading persistently a dishonest or criminal life." Upon this question of a man's leading persistently a dishonest or criminal life, where there has been a considerable lapse of time between a man's last conviction and the commission of the offence which forms the subject of the primary indictment at the trial, notice containing particulars must have been given and proved of the facts upon which the prosecution rely for saying that the offender

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is leading such a life. If, on the other hand, the time between a man's discharge from prison and the commission of the next offence is a very short one, it may be open to the jury to find that he is leading persistently a dishonest or criminal life by reason of the mere fact that he has again committed an offence so soon after his discharge from a previous one, provided the notice has stated this as a ground. This is a question of fact. See *R.* v. *Condon*, 4 Cr. App. R. 109: 1910; *R.* v. *Heard*, 7 Cr. App. R. 80: 1911.

In our view any attempt by a man to lead an honest life after his discharge should be put clearly and emphatically before the jury (*R.* v. *Mitchell*, 7 Cr. App. R. 281: 1912; *R.* v. *Sullivan*, 9 Cr. App. R. 201: 1913; *R.* v. *Hammersley*, 14 Cr. App. R. 118: 1919), and care should be taken when evidence is given of the man's repute during such period, to see that such evidence is of a character that is properly admissible and fairly left to the jury. *R.* v. *Young*, 9 Cr. App. R. 185: 1913.

(3) *Proceedings after conviction.*—It should be observed that there is no obligation on the Court to pass a sentence of preventive detention. Unless the Court passes a sentence of penal servitude for the primary offence, it has no jurisdiction to pass a sentence of preventive detention, and even if the Court does pass such a sentence of penal servitude, there is no obligation to pass a sentence of preventive detention in respect of the man having been found a habitual criminal. That is a matter for the consideration of the Court. *R.* v. *Stanley*, 1920, 2 K. B. 265; 14 Cr. App. R. 141.

We now deal with each case individually.

R. v. *Wilkins.*

The offender pleaded guilty to shop-breaking, and was convicted of being a habitual criminal. He was sentenced to five years' penal servitude, but the judge did not impose a sentence of preventive detention as the appellant was said to have earned an honest living for some years.

He had been previously convicted and sentenced as a habitual criminal in 1912, was released, and remained in employment till 1920. No consent had been obtained from the Director of Public Prosecutions to insert the charge of being a habitual criminal in

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the indictment, and no notice was served upon the offender that it was intended to insert such a charge. The Chief Constable, under a misapprehension, thought that he was authorised himself to insert such a charge.

This case offends against both the conditions precedent about practice and procedure before trial. There was no leave by the Public Prosecutor and no notice to the prisoner, and the conviction of being a habitual criminal must be quashed.

There is no ground for interfering with the sentence of penal servitude.

R. v. *Alfred Jones.*

The offender was convicted of breaking and entering a dwelling-house and of stealing property, and of receiving property stolen from another house. He was convicted as a habitual criminal and sentenced to three years' penal servitude and five years' preventive detention.

There were in his case a number of the elements which go to make up a habitual criminal, he having been convicted 24 times, the last time in February, 1919, and he was released on licence with a *remanet* of 266 days to serve on the 13th May, 1921.

A proper notice of intention to insert in the indictment a charge of being a habitual criminal was given by the Director, and the facts stated in the notice, which were proved at the trial, afforded ample evidence to support a conviction on the charge, but nothing in the notice related to the period between the 13th May, 1921, and the 18th August then next, when he committed the crime for which he was then to be tried. Evidence was, however, given that on his arrest a putty knife and skeleton keys were found on him, that on his last release he failed to comply with the terms of his licence, and that he has been associating with persons of bad character.

None of these facts were set out in the notice to the offender before trial, and we are of opinion that the evidence was wrongly admitted, and the conviction for being a habitual criminal must be quashed.

There is no ground for interfering with the sentence of penal servitude.

We were asked in this case to apply the proviso to s. 4 of the Criminal Appeal Act, and to uphold the conviction upon the

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ground that no substantial miscarriage of justice had actually occurred.

There are undoubtedly many cases in which this proviso has been applied in cases of habitual criminals.

We are of opinion, however, that although there is ample jurisdiction in the Court to apply this proviso in a proper case, it should only be done with caution, and when there can be no possible doubt in the matter. We think that it is impossible to apply it in this case, for the evidence about the facts between the 13th May and the 18th August not only might have influenced, but did influence the jury in coming to their determination, and, as we have pointed out, that evidence was wholly inadmissible because no notice had been given thereof to the prisoner. See the cases, *R.* v. *Fowler*, 8 C. C. R. 240: 1913; *R.* v. *Heron*, 9 C. C. R. 29: 1913; *R.* v. *Macdonald*, 12 C. C. R. 127: 1916.

R. v. *Harris and Edwards.*

These men were convicted together for making counterfeit coin, and having counterfeit coin in their possession with intent to utter the same. Each of them was also convicted of being a habitual criminal, and sentenced to seven years' penal servitude and five years' preventive detention. Each appeals against sentence, and applies for leave to appeal against the coining conviction and that of being a habitual criminal. It was admitted before us that no reasonable grounds could be found for leave to appeal against the coining conviction. Both men were served with notice of intention to make the charge of being a habitual criminal, and the charge was contained in the indictment against each. In the case of Harris, who had been previously convicted eight times, and had served four terms of penal servitude, there was a period of eight months between his last release and the offence for which he was to be tried uncovered by anything contained in the notice. In the case of Edwards, who had been previously convicted six times, including one previous conviction for coining, there was a similar period of ten months uncovered. In each case evidence was given, however, of facts which, whilst not contained in the notice, tended to show that the accused were leading a persistently dishonest life during the periods uncovered by the notices.

This case stands in the same position as that of *Jones*.

The conviction as a habitual criminal must be quashed for the

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same reasons, and also for the same reasons we are unable to apply the proviso of s. 4.

R. v. *Wilcock.*

The appellant pleaded guilty at the Stafford Assizes (1) to unlawfully wounding Sarah Jane Reynolds; (2) to stealing a bicycle; and (3) to stealing some surplices and an altar cloth from a church at Hartshill. He was convicted of rape on Sarah Mountford and of robbery with violence from the same woman.

After his conviction he was then addressed (according to the shorthand note) by the deputy clerk of assize: "There is another charge against you of having been convicted at quarter sessions on the 12th April, 1915, of burglary and being a habitual criminal; were you so convicted?" To which he answered, "Yes." He was sentenced to five years' penal servitude on the rape count, to three years' penal servitude, concurrent, and to twenty-five strokes with the "cat" on the count for robbery with violence. In respect of the charges (1) to (3) above, he was sentenced concurrently to three years' penal servitude, and finally he was sentenced as a habitual criminal to ten years' preventive detention.

The appellant has a right under s. 11 of the Act for the Prevention of Crime to appeal to this Court against sentence, but it is doubtful whether he has given a proper notice of appeal. As, however, the prosecution were present, we gave the appellant leave to appeal generally, in order that the point raised by him might be decided. The granting of such leave, however, is in no way to be taken as a precedent.

The appellant desires to appeal against his sentence as a whole, and also against his conviction as a habitual criminal.

With regard to his appeal against the sentences in respect of the primary offences, there is no ground upon which it can be allowed. The rape and the robbery with violence were of an aggravated and atrocious character. It is not necessary to repeat the details. The sentence of penal servitude and a whipping was well deserved, was in no whit too severe, and must stand.

With regard to the conviction of being a habitual criminal, his first point is that there is a fatal irregularity in the indictment in that it did not contain a proper charge of his being a habitual criminal. The manner in which the charge should be preferred is laid down in rule 11 of the Indictments Act, 1915, above referred to.

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It was argued before us that rule 11 is imperative, and that nothing but the use of the very words set out in the rule will satisfy the statute. This, in our opinion, is not the case. The Indictments Act, 1915, and the rules enacted thereunder were framed for the purpose of getting rid of old technicalities, and not for the purpose of imposing fresh ones, and if the indictment contains in substance the charge that the appellant was a habitual criminal at the time in question, it would not be open to objection merely because it was not expressed precisely in the language of rule 11.

The statement in the indictment was that the appellant had in 1915 been convicted of being a habitual criminal, a statement which does not follow precisely rule 11, and does not contain an allegation that he had been sentenced to preventive detention.

The next point of irregularity raised by the appellant was that his answer to the deputy clerk of assize did not amount to a plea of guilty on a charge of being a habitual criminal.

In a sense that is true, for he said "Yes" to the question whether he had been previously convicted as a habitual criminal in 1915; but we have no doubt at all that the appellant thought that he was being charged with being a habitual criminal, knew he had been convicted and sentenced for such an offence, and intended to plead guilty to such a charge. He had received a proper notice setting out his previous conviction as such, and the fact that he had been sentenced to preventive detention, and the fact that he was at the time of committing the offences for which he was then on trial a convict on licence from that very sentence of preventive detention, the last of which facts was proved at the trial. He was defended by counsel, and neither he nor his counsel raised any protest when the learned judge proceeded to treat him as a habitual criminal in virtue of his answer to the question put to him by the deputy clerk of assize.

In these circumstances we hold that this is a case where the proviso to s. 4 of the Act can and should be applied, on the ground that no substantial miscarriage of justice has actually occurred.

The sentence in respect of the offence is unexceptional, and the conviction and sentence must be upheld.

We express no opinion what the result of such irregularity would be in different circumstances.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE SALTER, AND MR. JUSTICE ROCHE.

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23 *January.*

THOMAS ROTHWELL, *alias* MARMADUKE MILLER.

Observations on frivolous appeals or applications.

The Court refused an application by the applicant (who was not present) for leave to appeal against his conviction, on December 1st, at the County of London Sessions, of conspiracy to defraud and of false pretences, and against his sentence of three years' penal servitude.

In delivering the judgment of the Court, AVORY J. said: The Court has had to peruse something like 270 pages of typewritten transcript of the shorthand notes and a voluminous statement by the applicant running into thousands of words, in which he argues that he was improperly convicted, being apparently under the impression that the present application is in the nature of a new trial. The Court sees no ground whatever for giving leave to appeal. The only interference which could be proper in such a case would be to increase the sentence with a view to stopping frivolous appeals. It is worthy of consideration whether notices should not be exhibited in prison cells that in proper cases the Court will exercise its power to increase sentences. Something has to be done to dispel the illusion that this Court sits for the re-trial of cases on questions of fact.

Application refused.

W. D. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SANKEY, AND MR. JUSTICE ROCHE.

LEWIS HAROLD BELL.

1922
30 *January.*

When a sentence is not expressly made either concurrent or consecutive, the Court leans to the former sentence.

Appellant, who was present, was convicted, at the West Riding (Leeds) Sessions, on the 4th January, 1922, of obtaining money by false pretences, and was sentenced to eighteen months' imprisonment with hard labour.

He had been previously convicted, at the West Riding (Wakefield) Sessions, on the 17th October, 1921, of obtaining property by false pretences.

He appealed against the former conviction to this Court (above, p. 56).

Appellant in person.

J. H. Thorpe for the Crown.

SANKEY J.: We adopt the principle laid down in *Sullivan (John)*, 6 Cr. App. R. 4: 1910, that when a defendant, convicted on one charge, has yet to stand his trial for another offence or offences committed before that conviction, he ought to be tried at the earliest possible moment, and that the trial ought not to be delayed till his sentence has expired. Here the appellant was rightly tried at the earliest opportunity after his first conviction, and there is no ground for setting aside the second conviction. The question of sentence is a different one. The appellant was tried and found guilty, on the first count only. The other two counts remain on the file, but the Court is informed by the Chief Constable of the West Riding that it is not intended to proceed with them. The Chairman, in passing sentence of eighteen months' imprisonment with hard labour, did not indicate whether

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such sentence should be consecutive to, or concurrent with, the unexpired portion of the previous sentence, passed on different facts. The Court holds that, in the circumstances, the sentence appealed against should run concurrently with the unexpired portion of the previous sentence, and directs accordingly.

Sentence varied.

W. D. T.

MOSES MALAM.

Severity of respective sentences on co-defendants.

Appeal against sentence, by leave of the Court, granted on 23rd January, 1922.

Appellant, who was not present, was convicted, on his own confession, at the Stoke-on-Trent Borough Sessions, on 20th December, 1921, of shoplifting and larceny, and was sentenced by the learned Recorder to three years' penal servitude.

No counsel appeared.

The LORD CHIEF JUSTICE: The appellant pleaded guilty to two charges of shoplifting and larceny, in which he was concerned with other persons, including his elder brother. This Court granted leave to appeal against the sentence, because the appellant, although the younger of the men engaged in the crime, had received a much heavier sentence than the others. In order to give him a chance of redeeming his character earlier than he would otherwise do, the Court reduces the sentence of three years' penal servitude to one of eighteen months' imprisonment with hard labour.

Sentence reduced.

W. D. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SANKEY AND MR. JUSTICE SWIFT.

HECTOR ALAN McLAIN AND MATTHEW BARR.

1922
6 *February.*

When an indictment was duly tried during the operation of the Grand Juries (Suspension) Act, 1917 (and the trial adjourned, the jury having disagreed), a second trial after the repeal of that statute was within s. 38 (2) of the Interpretation Act, 1889 (and perhaps within the exception to rule in Surtees *v.* Ellison), *so that no presentment by a grand jury was necessary.*

Appeal against conviction on law, referred by the Registrar to the Court for summary determination.

The appellants were convicted at the Buckinghamshire Quarter Sessions, on 2nd January, 1922, of indecent assault, and were each sentenced by the learned Chairman, Lord Parmoor, to four months' imprisonment with hard labour.

The indictment against them had been presented at the previous quarter sessions for the county, holden on 21st October, 1921, under the provisions of the Grand Juries (Suspension) Act, 1917 (7 & 8 Geo. 5, c. 4). The jury disagreed, and the trial was adjourned to the next sessions.

In the meantime the Grand Juries (Suspension) Act, 1917, had ceased to operate, under the provisions of the Administration of Justice Act, 1920 (10 & 11 Geo. 5, c. 81), s. 4 (2), and Order in Council thereunder dated 13th December, 1921, from the 23rd December, 1921.

H. M. Paul for appellants, who were not present. The short point referred by the Registrar to the Court for summary determination is on the effect of the practical repeal of the Grand Juries (Suspension) Act, 1917, in the case of accused persons committed for trial while the Act was in operation, and against whom the indictment had been pre-

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sented under the Act. It is not contended that down to and including the abortive trial of the appellants on 21st October, 1921, anything had been illegally or irregularly done, but it is submitted that the *de facto* trial and conviction on 2nd January, 1922, were invalid. The effect of the Order in Council of 13th December, 1921, was that as from 23rd December, 1921, the Grand Juries (Suspension) Act, 1917, should be treated as if it had never existed. *Mawgan, Inhabitants of*, 8 A. & E. 496; 3 Neville & Perry, 502; 7 L. J. M. C. 98: 1838. In that case issue had been joined before the Highway Act, 1835 (5 & 6 Will. 4, c. 50) came into operation, repealing 16 Geo. 3, c. 78. The judgment was that of Lord Denman C. J., Littledale, Patteson, and Williams JJ. It was followed in *Denton, Inhabitants of*, 18 Q. B. 761; 1 Dears. C. C. 3; 21 L. J. M. C. 207; 17 Jur. 453: 1852.

Counsel was stopped.

The LORD CHIEF JUSTICE said that the further hearing would stand over so as to enable the matter to be argued by counsel on both sides.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SANKEY.

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H. M. Paul repeated the opening of his argument (as above). He contended that except for transactions past and closed the Grand Juries (Suspension) Act, 1917, must be treated as if it had never existed. He cited on this point, 1 Hale, Pleas of the Crown, 291; *McKenzie*, Russell & Ryan, 429: 1820; *Mawgan* and *Denton*, above.

The Indictments Act, 1915 (5 & 6 Geo. 5, c. 90), 1st sched., rule 2, requires the heading "Presentment of the Grand Jury." These words are essentials, and their omission is not a mere technical flaw. The words are absent in this case, because the indictment was not so presented. On 23rd December, 1921, there was restored to every accused person the right to protection by a grand jury. In *Chandra Dharma*, 1905, 2 K. B. 335, the Court for Crown Cases Reserved sustained the conviction on the ground that a change in the law of procedure was retrospective. See also *Crane* v. *Director of Public Prosecutions*, 1921, 2 App. Cas. 299; 15 Cr. App. R. 183; 37 T. L. R. 788; 65 S. J. 642.

If, as is submitted, the validity of this indictment depends on the Grand Juries (Suspension) Act, 1917, there is no power to proceed except under that Act. The repealing statute made no provision for procedure in pending cases.

[AVORY J. referred to the Interpretation Act, 1889, 52 & 53 Vict. c. 63, s. 38 (2): "Where . . . any Act passed after the commencement of this Act repeals any other enactment, then, unless the contrary intention appears, the repeal shall not (a) revive anything not in force or existing at the time at which the repeal

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takes effect, or (b) affect the previous operation of any enactment so repealed, or anything duly done or suffered under any enactment so repealed."]

It may be that this change in the law having been effected by an Order in Council was not a "repeal" within that sub-section. The Grand Juries (Suspension) Act, 1917, is indistinguishable on this point from the repealed Act in question in *Mawgan*, above.

[The LORD CHIEF JUSTICE referred to the fuller report of Lord Denman's judgment in 3 Neville & Perry, at p. 508.]

The question in both cases was one of statutory procedure.

[AVORY J. referred to *Keen* v. *R.*, 10 Q. B. 928: 1847, on inherent power of quarter sessions to adjourn a hearing.

SANKEY, J. referred to Maxwell on the Interpretation of Statutes, 6th ed., p. 731](*a*).

In any case it is submitted that this case is governed by *Mawgan* and *Denton*, above, and is not affected by the Interpretation Act.

C. K. Tatham for the Crown. It is here admitted that the indictment was good *ab initio*. In the cases of *Mawgan* and *Denton* the liability was itself created by the repealed Act. They are therefore no authority for the general proposition contended for. *Hitchcock* v. *Way*, 6 A. & E. 943: 1837, shows that where the law is altered by statute pending action, the pre-existent law must govern the rights of parties unless the Legislature clearly varies such rights. See also *Crowan, Inhabitants of*, 19 L. J. M. C. 20: 1849.

Apart from the Interpretation Act there is no such rule as here contended for, and the indictment remained good. In any case, the Interpretation Act, s. 38 (2), saves these proceedings. He cited on this point *Heston and Isleworth Urban District Council*

(*a*) See also Craies's Statute Law, 2nd ed., p. 315.

v. *Grout*, 1897, 2 Ch. 306; *In re Herts and Essex Waterworks Co., Ltd.*, 1909, W. N. 48.

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[AVORY J. referred to the War Emergency Laws (Continuance) Act, 1920 (10 & 11 Geo. 5, c. 5).]

Paul in reply. The cases of *Mawgan* and *Denton* were really to enforce a common law liability. The Interpretation Act cannot be construed by reference to the War Emergency Laws (Continuance) Act, 1920.

THE LORD CHIEF JUSTICE: In this case an indictment was duly presented at the October Quarter Sessions for an offence punishable under s. 52 of the Offences Against the Person Act, 1861. It is admitted that it was then a valid indictment, and that the Court had power to proceed with it in like manner as if it had been found a true bill by the grand jury. The Court proceeded with the trial, and issue was joined on the indictment, but, owing to the disagreement of the jury, the trial was not concluded, and was adjourned to the January sessions. There can be no question of the power of the Court to adjourn the trial, it is an inherent power in every Court. *Keen* v. *R.*, above.

The argument was that as the Grand Juries (Suspension) Act, 1917, ceased to have effect on December 23rd, 1921, the Court could not proceed because the indictment had not been found by a grand jury. Assuming that the effect of the Order in Council was to repeal the Grand Juries (Suspension) Act, the rule (*a*) that "it must be considered as if it had never existed" does not apply to "transactions past and closed." That means transactions that are the subject-matter of the enactment repealed. That is in this case the mode in which the indictment might be presented and found, and here that transaction is past and closed. The cases cited, *The Inhabitants of Mawgan* and of *Denton*, were both decided on the ground that the Court was deprived of the power of giving

(*a*) "It has been long established that when an Act of Parliament is repealed it must be considered (except as to transactions past and closed) as if it had never existed": per Lord Tenterden, C.J. *Surtees* v. *Ellison*, 9 B. & C. at 752: 1829.

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the judgment, which was provided by the statute that had been repealed. If there is anything in these cases to help the appellants' argument, the Interpretation Act, 1889, affords a complete answer to the argument. Therefore, in this case, the appeals must be dismissed, the sentences to run from February 6th, the first appearance in this Court.

Appeal dismissed.

Solicitor for the Appellants—*T. Duerdin Dutton.*

W. D. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SANKEY AND MR. JUSTICE ROCHE.

ARTHUR CYRIL BRADLEY.

1922
30 *January.*

The Court in its discretion will take into account outstanding charges against a convicted prisoner, and may, to cover them, increase the sentence.

Application for leave to appeal against sentence.

Applicant, who was not present, was convicted at the Lancashire (Salford Hundred) Sessions, holden at Manchester on the 9th January, 1922, of larceny, and was sentenced to 21 months' imprisonment with hard labour. He applied for leave to appeal against such sentence, in order that certain charges against him might be taken into account, which the Chairman had refused to consider, so that he might have "a clean sheet" when his sentence expired. No counsel appeared.

The Court gave leave to appeal so as to consider whether in the circumstances, the sentence should be increased.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SANKEY.

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20 *February.*

ARTHUR CYRIL BRADLEY.

Appellant in person.

J. H. Thorpe for the Crown. The Chairman, in passing sentence, took into consideration charges of simple larceny, but not charges involving false pretences.

The Court directed the further hearing to stand over, so as to give the appellant an opportunity of furnishing the inspector-detective with a list of the other offences which he desired should be taken into consideration.

21 *February.*

Thorpe. Appellant had supplied particulars of 12 cases in 1919, 1920, and 1921, in addition to 30 cases previously mentioned. There had been 16 previous convictions.

THE LORD CHIEF JUSTICE: The appellant's record is of an extraordinarily criminal character. He has been many times convicted, the last time in 1919, so the sentence of 21 months' imprisonment with hard labour was a moderate one. The learned Chairman refused to take into consideration other cases, being apparently of opinion that they were not sufficiently of the same nature to justify his doing so. The Court does not agree with the Chairman in this respect. We have allowed appellant, at his own request, to mention 42 other offences, mostly small ones, in order that at the end of his sentence he may come out a free man. The appellant says that he wants to reform and lead an honest life. It is not always safe to accept such promises, but in this case, in view of the appellant's statement, the Court has decided

to substitute a term of three years' penal servitude for the sentence of imprisonment, such increased sentence to cover all offences of which this Court has actual knowledge.

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21 *February.*

ARTHUR CYRIL BRADLEY.

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Sentence increased.

W. D. T.

ROY MONKMAN.

Outstanding charges should be taken into account in sentences, if possible. Shorthand writers must not abbreviate their transcripts of the trial.

Appeal against sentence.

Appellant, who was not present, was convicted at the West Kent Sessions at Maidstone, on 21st October, 1921, of obtaining money by false pretences, and was sentenced to six months' imprisonment with hard labour, to run consecutively to a term of twelve months he was then undergoing for attempted robbery.

He has appealed against such sentence on the ground that on his previous conviction at the Central Criminal Court, on 7th September, 1921, he had asked the Court to take into consideration the present charges, and he was under the impression that this had been done. It appeared, however, that the learned Recorder of London had instructed the officers of the Court that he was not dealing with the present charge.

No counsel appeared.

The LORD CHIEF JUSTICE: It cannot be said that either the sentence of twelve months' imprisonment or that of six months' was unduly severe in itself, but this Court holds to the view that a prisoner should feel no sense of wrong in the way he has been dealt with. In this case, where the appellant asked that both offences should be taken into consideration, and was under the impression that this had been done, the Court thinks it better that the two sentences should be made to run concurrently, and orders accordingly. The effect of this will be that the term of six months will merge in that of twelve months.

Sentence reduced.

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His Lordship added:—The shorthand note of the proceedings is not clear. In several cases recently this Court has had to complain of the insufficiency of the shorthand notes. It must be understood by shorthand writers that their duty is to take in shorthand everything that occurs at the trial, so that if an appeal is brought this Court may be able to form as good an opinion as is possible when reading the transcript. An abbreviated note is not sufficient. Everything that occurs at the trial must be taken, in the form of question and answer, which should be numbered, to admit of easy reference.

W. D. T.

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20 & 21 *Feb.*

WALTER JAMES MYERS.

The Court does not, as a rule, approve of a sentence to a term of penal servitude, merely to ground a sentence of preventive detention.

Appellant was convicted at the Central Criminal Court, before the Common Serjeant of London, on 12th January, 1922, of larceny, and of being a habitual criminal. He was sentenced to three years' penal servitude for the larceny, and to five years' preventive detention as a habitual criminal. He now appealed against his sentence for the larceny, and applied for leave to appeal against his conviction as a habitual criminal.

G. St. J. McDonald for the appellant (under s. 10 of the Criminal Appeal Act), who was present. A substantial period of seven months elapsed between his last release from prison and the larceny of which he was convicted. Further, he has earned an honest living in the meantime as a racing tipster, and endeavoured to supplement these earnings as an "expert mixer of cocktails." On both these grounds he should not have been convicted as a habitual criminal. The onus of proof is on the prosecution, and it has not been satisfied here. In any case, the sentence of three years' penal servitude is excessive for the larceny.

A. Bryan, for the Crown, cited *J. Heard*, 22 Cox C. C. 725; 76 J. P. 232; 28 T. L. R. 154; 106 L. T. 304; 7 Cr. App. R. 80: 1911, for the proposition that an interval of even nine months

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does not necessarily rebut the charge of being a habitual criminal.

[SANKEY J. referred to *Mitchell*, 23 Cox, C. C. 284; 28 T. L. R. 484; 76 J. P. 423; 108 L. T. 224; 7 Cr. App. R. 283: 1912.]

The larceny here was not due to want or sudden temptation. The business of a racing tipster, as conducted by appellant, who falsely described himself as "a well-known sporting journalist," was not an honest one. With regard to the sentence of penal servitude, the learned Common Serjeant would presumably have preferred to send the appellant to preventive detention without such a sentence.

[The LORD CHIEF JUSTICE: He appears to have said that to legalise preventive detention he must send him to penal servitude. Do you uphold that?]

Bryan: No. The wording is unfortunate.

The LORD CHIEF JUSTICE: Without going into the merits or demerits of a racing tipster's business, the Court has come to the conclusion that, having regard to the length of time which elapsed between the appellant's last offence and his present offence, and to the nature of the present offence, this is not a case in which the Court can approve of the sentence of penal servitude. The learned Common Serjeant having phrased his sentence in the way he did, this Court thinks that the sentence should be modified by reducing it to one of eighteen months' imprisonment with hard labour, to date from conviction.

Conviction as habitual criminal quashed and sentence reduced.

W. D. T.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE SANKEY AND MR. JUSTICE SALTER.

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6 *March.*

EDWARD ERNEST BLACK.

A statement by a deceased person about his past symptoms and cause of ill-health made in the presence of the accused, on a trial for the homicide of that person, may always be given in evidence if made in such circumstances as to require some answer or comment from him.

Application for leave to appeal against conviction for murder.

The appellant was convicted at the Cornwall Assizes, at Bodmin, on the 2nd February, 1922, before Rowlatt J., of the wilful murder of his wife, and was sentenced to death.

J. L. Pratt for the appellant (under s. 10 of the Criminal Appeal Act), who was present, contended that the conviction was against the evidence, as no motive for the crime had been suggested, and the course of the deceased's illness was consistent with her having suffered from gastritis only up to the date when Black left home, and with arsenic having subsequently accidentally found its way into the body, *e.g.*, as an impurity in food and medicine. Gastritis was admittedly prevalent in the neighbourhood at the time. Mrs. Black's doctor treated her throughout for gastritis; a witness for the prosecution admitted that deceased was suffering from indigestion, sickness, and diarrhœa two days before the alleged purchase of arsenic by Black. The Crown experts admitted that the minute quantity of arsenic found in the body was consistent with the administration of arsenic in medicinal doses, or with the accidental administration of one-third grain of arsenic the day after Black had left home.

Hearsay evidence was wrongly admitted:—(1) The doctor who attended deceased gave evidence of (a) complaints by deceased of vomiting and diarrhœa, although he never saw signs of either

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trouble; (b) of her statements about what she had done on the day preceding and the morning of her illness; (c) of enquiries made by the doctor whether other members of the household were affected, and the result of such enquiries. (2) Neighbours gave evidence that although they never saw any vomiting deceased complained to them that she had suffered from it, and in particular stated that the medicine had caused her great pain and vomiting after Black had given it to her.

This evidence was sought to be justified (a) as statements by the deceased of her bodily feelings and symptoms, and (b) as being made in the presence of Black. Statements about bodily feelings must be confined to contemporaneous symptoms. Any narrative of past symptoms or statement about the cause of symptoms is inadmissible.

[SALTER J.: Surely "contemporaneous" cannot be confined to feelings experienced at the actual moment when the patient is speaking; it must include such a statement as "Yesterday I had a pain after meals."]

This class of evidence has all the vices of hearsay, and must be confined within the narrowest limits if admitted at all.

It was not proved that Black was present when these statements were made. Rowlatt J. failed to direct the jury on the effect of statements made in the presence of an accused person. In one instance, when deceased said that medicine which Black had given her burned her throat, Black said, "I don't know anything about that." That was a denial which rendered the whole conversation inadmissible. Counsel cited *Gloster*, 16 Cox, C. C. 471: 1888; *W. A. Thomson*, 1912, 3 K. B. 19; 81 L. J. K. B. 892; 107 L. T. 454; 28 T. L. R. 478; 76 J. P. 431; 23 Cox, C. C. 187; 7 Cr. App. R. 276.

[AVORY J. referred to *Aveson* v. *Lord Kinnaird*, 6 East, 188: 1805.]

Holman Gregory, K.C. (with him *Harold Murphy*) for the Crown. The question of motive was immaterial. There was a false statement about the purchase of the arsenic. The jury had

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all the evidence before them, and their finding was justified. The evidence objected to consisted of statements made in the accused's presence. *Johnson,* 2 C. & K. 354: 1847.

Pratt in reply.

AVORY J., after reviewing the facts, continued: The criticism addressed to the admissibility of the evidence is really the only point that requires consideration. With regard to the statements made by the deceased about her past symptoms, the Court is clearly of opinion that these statements were all admissible. If it had appeared that these were statements made behind the back of the appellant, it would have required grave consideration whether they could have been admitted, but the Court is satisfied that they were made in his presence in such circumstances as to require some answer or comment from him, and that the absence of any such comment was evidence from which the jury might draw inferences. The Court has come to the conclusion that the objection to the admission of the evidence in question was not well founded. The answer, "I don't know anything about that," was admissible, because it was not necessarily a denial of the truth of the deceased's statement; it was capable of meaning "what she said is true, but I don't know why the medicine should have that effect." The actual meaning was for the jury. The authorities are sufficiently collected in Sir J. F. Stephen's "Digest of the Laws of Evidence," Art. 11, p. 16, 6th edition.

Appeal dismissed.

W. D. T.

WILLIAM SULLIVAN.

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Avory J.
Sankey J.
Salter J.

It is an abuse of the right of calling rebutting evidence to recall a witness merely to repeat his evidence in chief.

The true rule about rebutting evidence is laid down in Crippen, 5 *Cr. App. R.* 255, 1911.

Shorthand notes of counsel's speeches are proper in certain cases.

Application for leave to appeal against conviction for murder.

The appellant was convicted at the Assizes at Monmouth, on the 8th February, 1922, before Darling J., of the wilful murder of Margaret Thomas on October 26th, 1921, near Abergavenny, and was sentenced to death.

S. R. C. Bosanquet for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The appellant in the box set up an *alibi*, saying that he had been in the company of a man named Stuart, and he denied the previous possession of the things found in the house, and of others which were stolen from it. The judge directed that Stuart should be recalled. A witness named Jones was also recalled and questioned about the payment of a Treasury note for drink at an inn. At the close of the evidence the judge directed the shorthand writer to take a note of the speeches of counsel, in view of a possible defence. It is not contended that there was not some evidence on which the jury were entitled to act. But it is contended that the learned judge at the trial took upon himself the function of a prosecuting counsel by recalling certain evidence, after the accused had given evidence, and by calling further evidence after the speeches of counsel. This constituted a mistrial, and the verdict should not be allowed to stand. Criminal Procedure Act, 1865 (28 & 29 Vict. c. 18), s. 2; Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 2; *Crippen*, 1911, 1 K. B. 149; 80 L. J. K. B. 290; 103 L. T. 705; 22 Cox, C. C. 289; 27 T. L. R. 69; 75 J. P. 141; 5 Cr. App. R. 255. The case was very fairly put by counsel for the Crown, but the judge was not satisfied with the way they dealt with it, and he took upon himself the function of a prosecuting counsel by recalling certain evidence after the accused had given evidence, and by calling further evidence after the speeches of counsel. The evidence against the prisoner followed three lines, (1) evidence to show that he was in the neighbourhood of the scene of the

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crime; (2) evidence to prove that certain articles found in the cottage after the murder belonged to the prisoner; and (3) evidence that the prisoner was found dealing with clothing alleged to have been stolen from the husband of the deceased woman. If the identification by the husband was reliable, the evidence about the latter was very strong. The prisoner was identified by two witnesses as having sold the clothing, and it was impossible in cross-examining these witnesses to shake their evidence, and so they were to a great extent left alone. After the prisoner had given his evidence the strongest of these witnessses was recalled by the judge merely to repeat the evidence she had previously given. After the speeches of counsel the judge recalled other witnesses for the purpose of emphasising the evidence they had previously given. The effect of this was to neutralise as far as possible both the evidence of the prisoner and the speech for the defence. This a judge has no right to do. The prosecution are, of course, entitled to call rebutting evidence, but nothing further, and the judge has no greater power. If what was done is permissible, there is nothing to prevent any judge, whether a judge of the High Court or of an inferior Court, from recalling such witnesses as he chooses at any stage in order to strengthen the case against a prisoner. The conduct of the judge constitutes a mistrial.

Arthur Powell, K.C. (with him *Lort-Williams*) for the Crown. The evidence recalled by the learned judge might have been equally in the accused's favour as otherwise. It was within the competency of a judge to call such evidence in a criminal case.

[SANKEY J. referred to *In re Enoch*, 1910, 1 K. B. 327; 79 L. J. K. B. 363; 101 L. T. 801.]

That was a civil case, and concerned the powers of an arbitrator.

[AVORY J.: Is there not some authority differentiating between a judge's powers in civil and criminal cases?]

There are many cases indicating that he has greater power in a criminal case than Moulton L.J. said in *Enoch* that he had in civil cases. See a passage in Cockle on Evidence (3rd ed.), p. 375. See also *Seigley*, 6 Cr. App. R. 106: 1911; and *per* Hamilton J. in *Howarth*, 82 J. P. 152; 13 Cr. App. R. 99: 1918.

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Bosanquet, in reply, cited *Remnant,* R. & R. 136: 1807; *Watson,* 6 C. & P. 653: 1834; *Frost,* 4 St. Tri. (N. S.) 86: 1839; *Haynes,* 1 F. & F. 666: 1859.

AVORY J., after reviewing the facts, continued: Subject to the objections which the Court has to consider, it is not really disputed that there was evidence on which the jury could convict. It is objected that the judge himself committed irregularities in recalling witnesses, partly after the accused's evidence, and partly after counsel's speech for the defence. So far as that was rebutting evidence to answer evidence set up by the accused for the first time, no objection could be taken. All the witnesses so recalled properly come within the principle of rebutting evidence. The Court relies on the decision in *Crippen* (above).

At the close of this rebutting evidence the judge requested the shorthand writer to take a note of the speeches of counsel. That practice has been authorised by this Court, because in considering criticisms of a summing-up the Court must have regard to the issues put before the jury by counsel.

The Court is satisfied that counsel for the defence had put before the jury the theory that the murder might have been committed by the husband of the deceased. We do not suggest that it was not perfectly proper for counsel to make the suggestion. In a case of murder counsel is entitled to explore every avenue which may lead to the acquittal of the accused. The judge recalled two police-constables, and the husband, David Thomas. With regard to the police-constables, counsel complained that they were recalled merely to re-state their evidence. If the Court had come to the conclusion that this was so, they would have held that it was an irregularity, and would have been bound to consider whether a substantial miscarriage of justice had occurred. But the Court has come to the conclusion that they were recalled for the same purpose as Thomas, *i.e.*, to rebut this suggestion.

The Court has come to the conclusion that the objection fails; there has been no irregularity that caused any injustice to the accused, and the appeal must be dismissed

Appeal dismissed.

W. D. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SHEARMAN AND MR. JUSTICE SALTER.

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HAROLD JONES ALIAS GEORGE WRIGHT.

Evidence that a person alleged to be a habitual criminal has committed a specific crime for which he has not been tried is not admissible to prove that he was leading a dishonest life during the statutory period.

The true meaning of a "substantial miscarriage of justice" in the proviso to s. 4 of the Criminal Appeal Act discussed.

Appeal against conviction as a habitual criminal by leave of this Court granted (against the conviction only) on 13th March, 1922, when legal aid was also granted.

Appellant was convicted at the Central Criminal Court on 6th February, 1922, before the Common Serjeant of London, of burglary, and of attempting to shoot with intent to resist arrest, and of being a habitual criminal, and was sentenced primarily to five years' penal servitude, and to five years' preventive detention as a habitual criminal.

He now appealed against conviction as a habitual criminal.

C. R. Morden for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. Appellant was originally charged (1) with housebreaking jointly with one Panchenro (whose application for leave to appeal was to-day refused), on January 5th, 1922; (2) with burglary on January 8th, 1922; and (3) with being a habitual criminal. Panchenro pleaded guilty, and appellant not guilty to the first charge. Appellant was convicted on the second charge. The prosecution elected not to proceed with the first charge against him. Evidence was adduced to identify him with the person in company with Panchenro on January 5th, with a view to showing that he was "leading persistently a dishonest and criminal life."

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The evidence of the alleged offence of January 5th should not have gone to the jury upon the charge of being a habitual criminal. The jury heard that evidence after proof of previous convictions, and were necessarily prejudiced. The trials of the two questions should have been separate. There was a sufficient interval between his release from prison on October 13th, 1921, and the primary offence on January 8th, 1922, to require proof that he was living a dishonest, &c. life during that period. There was some evidence to the contrary. He was trying hard to get employment with a shipping firm; he was helped by the Rev. Mr. Martin with some money to find employment. *Baggott*, 4 Cr. App. R. 67; 74 J. P. 213; 26 T. L. R. 266: 1910; *James Young*, 23 Cox, C. C. 624; 9 Cr. App. R. 185: 1913.

J. H. Thorpe for the Crown. There was sufficient proof against appellant apart from the evidence complained of. *Heard, John*, 7 Cr. App. R. 80: 1911. In any case, there was no substantial miscarriage of justice, and the proviso to s. 4 of the Criminal Appeal Act, 1907, should apply.

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The LORD CHIEF JUSTICE (*a*): With regard to the second part of the appeal, that is to say, the part which relates to the further sentence of five years' preventive detention, the matter appears to call for a little further investigation. The prisoner was charged so far as that part of the matter is concerned, under the 10th section of the Prevention of Crime Act, 1908, and it was alleged against him that he was a habitual criminal. I do not re-read the whole of that section, but by sub-section 2 it is provided as follows: "A person shall not be found to be a habitual criminal unless the jury finds on evidence (a) that since attaining the age of sixteen years he has at least three times previously to the conviction of the crime charged in the said indictment been convicted of a crime, whether any such previous conviction was before or after the passing of this Act,"—"and," *not* "or"—"and that he is leading persistently a dishonest or criminal life."

Now with reference to that further charge a certain notice was served, as it was bound to be served, upon the prisoner, and in that notice certain grounds were set out upon which the charge

(*a*) This judgment is printed from a transcript of the shorthand notes, supplied by the courtesy of the Director of Public Prosecutions.

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that he was a habitual criminal was about to be established or sought to be established, and the fourth of those grounds was in these terms: "That having been discharged from prison on the 13th day of October, 1921, on the 5th day of January, 1922, you committed the first of the offences for which you are now awaiting your trial." Now the offence which is there referred to as "the first of the offences for which you are now awaiting your trial" was an offence said to have been committed jointly by the appellant and a man named Panchenro.

Panchenro pleaded guilty, and thereupon the prosecution, in the exercise of an undoubted discretion, decided not to proceed substantively with that charge as against the appellant. The matter therefore stood in this way so far as that charge was concerned when the issue, Aye or No, was the appellant a habitual criminal? came to be tried by the jury. He had been charged, but the charge had not been proceeded with, but as part of the material upon which the members of the jury were then invited to infer and to find that the appellant was, in fact, a habitual criminal some evidence was offered—not, indeed, that he had joined in committing this crime of the 5th day of January, but that he had been in the company of a person who had pleaded guilty to the commission of that crime, and, ultimately, with the direction which has been read, the matter went to the jury upon the question whether the appellant was a habitual criminal, including the material which I have referred to, namely, that although not charged with, and although not convicted of, the crime of the 5th day of January, nevertheless his association with the person guilty of that crime was evidence supporting the inference that he then was leading a persistently criminal life.

Now the question is whether that part of these proceedings was regular, and the Court is of opinion clearly that where, in this matter of seeking to establish that an accused person is a habitual criminal, the prosecution rely upon the commission of a crime as a part of the material upon which that conclusion is to be founded, then the prosecution ought to prove that the crime has been committed, and ought not to offer some evidence in relation to it to a jury which by that time *ex hypothesi* has already been informed of the prisoner's history of previous convictions.

We are of opinion, therefore, that in this particular respect

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that which was done here was irregular, and it is a course which cannot be regarded with approval.

The question then arises whether under the proviso to section 4 of the Criminal Appeal Act, 1907, the Court ought to draw the inference that no substantial miscarriage of justice has actually occurred. That proviso is in these terms: "Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred." Now we have no doubt that there were materials in this case, when we look at the previous history of this appellant, from which the jury might most properly have inferred, and probably would have inferred, that he had been, and then was, persistently leading a criminal life. But that, after all, is not quite the question,—the question is not whether the jury might have come to the conclusion to which they did in the absence of the material irregularly admitted; the question is rather: Must they have come to that conclusion? No doubt, as was pointed out in this Court in the case of *Frederick Williams* (reported in Volume VIII. of the Criminal Appeal Reports, p. 49), the nature of the primary offence on which the allegation of being a habitual criminal is founded, may alone justify the charge, and no doubt, apart from this matter relating to Panchenro, there was ample material here to justify the charge; but this material was admitted, and, therefore, the Court is bound to consider the difficult question relating to the effect which that material may have had upon the mind of the jury.

Now with regard to that matter I should like to refer to two cases, and two cases alone. One is in the year 1913, and the other, seven years later, is in the year 1920. The case in the year 1913 is that of the *King* v. *Rodley*, 1913, 3 K. B. 468; [9 Cr. App. R. 69], before the Court of Criminal Appeal, and the judgment at page 474 contains this passage: "The question then arises whether this is a case in which this Court can take advantage of the proviso to section 4, sub-section 1 of the Criminal Appeal Act, 1907, and say that in spite of the admission of the evidence there has been no substantial miscarriage of justice. Upon this question the Court of Criminal Appeal is always at somewhat of a disadvantage as compared with the judge who heard the case, and who saw the witnesses and was acquainted with

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the impression made by those witnesses upon the jury. The rule adopted by this Court, however, has been that it will not act upon the proviso in any case in which it appears to it clear that the jury may have been influenced by the evidence wrongly admitted. The Court is unable in the present case, and upon the materials before it, to say that the jury may not have been so influenced, and the decision, therefore, is that the conviction must be quashed." Now that was in the year 1913. The matter arose again in the case of *Alfred Williams* and *Albert Woodley* in 1920, a case which is reported in the 14th volume of Criminal Appeal Cases, page 135, and the particular passage in the judgment of the Court delivered by Lord Reading, then Lord Chief Justice, is as follows: "The meaning to be atrributed to these words, 'no substantial miscarriage of justice has actually occurred,' was dealt with by Mr. Justice Channell in *Cohen and Bateman,* 2 Cr. App. R. 197: 1909, at page 208, where he says: 'If, however, the Court in such a case comes to the conclusion that on the whole of the facts, and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice, or at all events, no substantial miscarriage of justice within the meaning of the proviso, notwithstanding that the verdict actually given by the jury may have been due to some extent to such an error of the judge not being a wrong decision of a point of law.'" There the quoted passage ends, and Lord Reading proceeded: "The importance of that is that it shows that what the Court has to consider is whether, notwithstanding the irregularity, the only reasonable and proper verdict would be one of guilty, and if that is so, there is no miscarriage of justice. It is sufficient to say that here is a case of a serious irregularity, and that applying the proviso of section 4 of the Act of 1907, we have come to the conclusion on the facts of this case, and having regard to the evidence given at the trial, that without this irregularity, and assuming that there were no notes of the previous convictions of the appellants on the abstract supplied to the jury, they must inevitably have arrived at the same verdict of guilty against the appellants." There the matter seems to be summed up, if I may say so, in a couple of words, "must inevitably." Now here, as I said a moment ago, there were without doubt ample materials from which the jury might infer, and properly infer, that at the crucial time this appellant was persistently leading the life of a habitual criminal,

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but it is impossible for the Court, even upon the materials which are before it, to say that the jury "must inevitably" have come to that conclusion if it had not been for the inserting of the addition of that part of the matter which, as I have already said, appears to us to have been irregularly admitted.

In those circumstances it is impossible for us to enter into a speculation about what the jury might, could, would, or should have done, and as we do not feel able to say that they "must inevitably" have come to the conclusion to which they did come in the absence of the material improperly admitted, the decision of the Court is that so far as the sentence of preventive detention is concerned, that sentence must be quashed; that is to say, the conviction of the appellant as a habitual criminal will be quashed.

The conviction resulting in the sentence of five years' penal servitude for burglary will stand.

Conviction as habitual criminal quashed.

W. D. T.

WALTER WOODS.

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An indictment for being in possession of "Bank of Engraving" "notes" may be properly laid under s. 9 (a) of 3—4 Geo. V. c. 27, the Forgery Act, 1913.

In order to prove that such a "note" is designed to resemble a Bank of England note it is not necessary to produce a specimen in evidence, as its form, contents, &c. are notorious; aliter, *perhaps, of less common valuable securities.*

Appeal against conviction on law.

Appellant was convicted at the Kent Assizes at Maidstone, on the 10th February, 1922, before Lord Coleridge J., of knowingly, without lawful authority, having in his custody or possession certain paper (commonly known as "Bank of Engraving" notes) intended to resemble and pass as special paper such as is provided and used for making bank notes, and was sentenced to three years' penal servitude.

He now appealed against his conviction on law, and also applied for leave to appeal against his sentence.

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Hohler, K.C. (with him *St. J. Hutchinson*) for the appellant, who was present. This indictment was framed under the Forgery Act, 1913 (3 & 4 Geo. V. c. 27), s. 9 (a), which prohibits making, using, &c., "Any paper intended to resemble and pass as (1) special paper such as is provided and used for making any bank note . . ." There was no evidence that the paper was intended to resemble or pass as special paper within the section. Expert evidence should have been called. At least a genuine bank note should have been submitted to the jury for comparison. The jury had no right to act on their knowledge, if any. There was no opportunity to cross-examine on the character of the paper. The Act contains no provision dispensing with strict proof, such as is contained in the Coinage Offences Act, 1861 (24 & 25 Vict. c. 99), s. 29. The case is analogous to cases of "passing off" in the Chancery Division. *London General Omnibus Co., Ltd.* v. *Lavell*, 1901, 1 Ch. 135; 70 L. J. Ch. 17; 83 L. T. 453; *Bourne* v. *Swan and Edgar, Ltd.*, 1903, 1 Ch. 223; 72 L. J. Ch. 168; 87 L. T. 589; 57 W. R. 213. An indictment in respect of "Bank of Engraving" notes should have been laid under s. 9 (e)—"uses or knowingly has in his custody any paper upon which any such words, figures, letters, marks, lines, devices have been printed or in anywise made as aforesaid"—where the gist of the offence consists in the words, &c., printed on the paper. "Paper" in s. 9 (a) merely means blank paper. There was no sufficient evidence to warrant a conviction under the indictment as laid without production of a genuine bank note, and the conviction should therefore be quashed. In illustration of his argument counsel handed up to the bench a £5 Bank of England note, which was carefully compared by the Court with specimens of the "Bank of Engraving" notes found on appellant.

Thesiger for the Crown was not called on.

The LORD CHIEF JUSTICE: The summing-up of the learned judge sufficiently directed the jury to address their minds to the question whether these notes were in fact intended to resemble and pass as genuine bank notes. The Court is of opinion that in a comparison with something so familiar as a bank note it is not necessary to produce a genuine note. It might be otherwise in the case of other and less familiar documents, *e.g.*, a Treasury bill.

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It does not follow that because an indictment might have been laid under s. 9 (e), one was not properly laid under s. 9 (a). The Court holds that this indictment was properly so laid, and the appeal against the conviction must be dismissed.

In view of the previous convictions leave to appeal against the sentence is refused; but inasmuch as a substantial point of law has been raised, the sentence will run from the date of conviction.

Appeal dismissed.

Solicitor for the Appellant—*Appleton & Co.*

W. D. T.

March 30th. The Court (The Lord Chief Justice, Shearman and Salter, JJ.) sat.

THE "DAILY MIRROR" NEWSPAPERS, LIMITED, AND CHARLES WILLIAM GLOVER.

3 *April.*

A corporation cannot be committed for trial.

Appeal of *The Daily Mirror Newspapers, Ltd.*, against conviction on law and on certificate.

Appeal of the appellant Glover against conviction on law.

The Appellant Co. was summoned to appear on August 27th, 1921, before Justices for Hertfordshire, at Hertford, on charges for a corrupt practice framed under the Representation of the People Act, 1918 (7 & 8 Geo. V. c. 64), s. 34. The appellant, Glover, was summoned for aiding and abetting them.

The evidence established that the appellant company distributed posters in the form of contents-bills of the "*Daily Mirror*" in the Eastern Division of Hertfordshire in support of the candidature of Rear-Admiral Sueter, who was the successful candidate at a by-election in June, 1921, for the constituency. The appellant Glover an employee of the appellant company visited the constituency and arranged for the distribution and exhibition of such posters.

The Justices decided to send the case against both appellants for trial to the next Assizes for the county of Hertford, and

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issued a warrant of commitment in the usual form (T. 1) which purported to direct the constables to take "the said accused" and them safely to convey to H. M. prison at Brixton, &c.

At the next Assizes for the county of Hertford, holden at Hertford on 19th November, 1921, an indictment was presented purporting to be framed under the provision of the Grand Juries (Suspension) Act, 1917 (6 & 7 Geo. V. c. 4), which was then in operation. No consent or direction in writing had in fact been obtained from a judge of the High Court, or from the Attorney-General or Solicitor-General under s. 1 (2). The proceedings were removed by *certiorari*, at the instance of the prosecution, from the Assizes to the High Court. At the trial before Rowlatt J. and a special jury in the King's Bench Division on 2nd March, 1922, the jury convicted both appellants, who were sentenced as follows:—the appellant company to a fine of £100; and the appellant Glover to a fine of £20.

Sir John Simon, K.C. (with him *Sir Richard Muir* and *T. E. Haydon*), for the appellant company. S. 1, sub-s. (2) of the Grand Juries (Suspension) Act, 1917, has not been satisfied. In the absence of the consent of a judge or law officer, there must be an actual committal for trial. "In no other case" could an indictment be presented without having been found by a grand jury. Although, for many purposes "person" may in law include a corporation, a corporation cannot in fact be committed for trial. It is a mere juristic entity and the warrant of commitment, as regards the appellant company, was a nullity. Committal is a physical act and is something more than the mere issue of a warrant of commitment. The Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 27 construes "committed for trial" in a statute ("unless the contrary intention appears") as "committed to prison with the view of being tried," &c. That procedure is only applicable to an individual person. Therefore there was here no indictment at all as against the appellant company.

[The LORD CHIEF JUSTICE: Has it not been held that a limited company cannot be convicted as a rogue and vagabond?]

Yes: in *Hawke* v. *E. Hulton & Co., Ltd.*, 1909, 2 K. B. 93; 78 L. J. K. B. 633; 100 L. T. Rep. 905; 73 J. P. 695. The

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learned judge admitted that while a company might be indicted, to talk of committing a company was perilously near nonsense. This whimsical document called a warrant of commitment is not actual committal. Committal in the case of the appellant company was an impossible proceeding, and their appeal should therefore succeed.

Sir Ellis Hume-Williams, K. C. (with him *Roland Oliver*), for the respondents. The course here taken was the first of those open under the Grand Juries (Suspension) Act, 1917, namely, a successful application for a committal. There are no merits in the objection taken, which, at the highest, may be described as an attractive technicality. As such it may be met by another technicality. Here was an indictment on the face of it good.

[The LORD CHIEF JUSTICE: But must not the Court of trial see that the preliminary steps have been duly taken?]

The legislature had in 1917 no intention of differentiating between an individual and a corporation. A corporation could then be the subject of the criminal law. *Ascanio Puck & Co., Ltd.*, 76 J. P. 487; 28 T. L. R. 197: 1912.

[SHEARMAN J. pointed out that from the report in 28 T. L. R. it would appear that there was in that case no committal.]

In an unreported case of *George Mann & Co., Ltd., Times* Newspaper, March 21st, 22nd, 25th, 1919, before Bailhache J., the defendant corporation had been actually committed at Bow Street during the operation of the Grand Juries (Suspension) Act, 1917.

[*Sir R. D. Muir:* They purported to be committed, and no objection was taken.]

[The LORD CHIEF JUSTICE: In your experience, has it been common for companies to be in form committed?]

[*Sir R. D. Muir:* Such cases have been very few, and all defects of committal have been cured by the finding of a grand jury.]

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Simon in reply. In *Ascanio Puck & Co., Ltd.*, whether there were a committal or not, there was a good bill of indictment. Here there was no committal, and therefore no bill.

[THE LORD CHIEF JUSTICE: The Court holds the objection good.]

Simon for the appellant Glover. The learned judge should have directed the jury that before Glover could be convicted of aiding and abetting he must be shown to have acted for the purpose of procuring the election of a particular candidate. He was a mere servant of the appellant company, doing his duty to his employers and earning his living.

[SHEARMAN J.: But could any man of sense, looking at the bills produced bearing the words, "Sueter will stop waste," or "Sueter winning in E. Herts," not be aware that they said to the electorate "Vote for Sueter"?]

Simon. They do not say it.

[SHEARMAN J.: They shout it.]

Simon. They may suggest it, but they are not sufficient to criminate a mere subordinate whose only real purpose is to earn his living.

Muir followed (by permission of the Court, owing to the enforced absence of his leader (*a*)). It was necessary to show that Glover's mind went with the crime to establish *mens rea* against him. The probable effect of the bills on the electorate is immaterial. Furthermore, as the conviction of the appellant company fails, the appellant Glover cannot be liable as an aider and abettor..

Hume-Williams, for the respondents, was not called upon.

The LORD CHIEF JUSTICE said that the indictment was presented under the Grand Juries (Suspension) Act, 1917, at the Hertford Assizes, and was framed under s. 34 of the Represen-

(*a*) See *Weaver*, 1 Cr. A. R. 12: 1908.

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tation of the People Act, 1918, and contained in all seven counts. The jury convicted on the first two. The first count was that on June 15th, 1921, the appellant company unlawfully incurred the expense of £17 8*s*. on account of issuing advertisements and publications for the purpose of promoting and procuring the election of Rear-Admiral Sueter without being authorised in writing to do so by the election agent; and that Glover aided and abetted the company to commit that offence. The second count related to the sum of 25*s*., and was in the same terms. Dealing first with the case of the company, it was urged that the conviction could not stand, as the requirements of the Grand Juries (Suspension) Act were not satisfied. When this indictment was preferred the Suspension Act was in force. What happened was that the indictment was removed into the King's Bench Division, and was there tried before Mr. Justice Rowlatt. The learned judge held that there was no evidence to go to the jury on counts three to seven, and when he came to the summing-up he directed the jury that he left only the first two counts to them. The position in the special circumstances of the time was that in order that the indictment might be properly presented, one of three antecedent steps must have been taken, and properly taken; that was to say, the person against whom the indictment was sought to be preferred must have been committed for trial, or the consent of a High Court judge must have been given, or the consent or direction in writing of the Attorney-General or the Solicitor-General must have been given. In this case it was not suggested that either of those two latter steps was taken, but what was said to have been done was to obtain a committal for trial of the appellants. The warrant of commitment was before the Court, and it concluded with the usual phrase:—"These are therefore to command you the said constables . . . and safely to convey to his Majesty's prison at Brixton, and there to deliver them to the governor thereof together with this precept."

The argument which was presented on behalf of the company was that a limited company could not be imprisoned; that this warrant of commitment could not physically be carried out, and that therefore there was no proper committal at all; as, indeed, in the case of a limited company, there could not be; and, as neither of the two alternative courses was pursued, it followed that none of the antecedent steps, between which a choice was offered, was

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taken before the presentation of this indictment. It had been argued on the other hand that in fact a limited company might be committed to prison, and the Court had been referred to *Ascanio Puck & Co.* (above). But when one looked at that case —whatever else it might support or establish—it appeared to lend no support to the particular proposition with reference to which it had been cited. When one looked at the clear terms of the Grand Juries (Suspension) Act, following as they obviously did very closely the provisions of the Vexatious Indictments Act, 1859, he could not resist the view that "committed for trial" in the one Act meant the same thing as that which was meant by committing or detention in custody in the other. He thought therefore that there was not, and could not be, any proper committal for trial of the limited company, and upon that point, which had been described in various phrases, sometimes as "an attractive technicality," and sometimes in other terms, this appellant company succeeded. There was, of course, no substance in it—nothing was involved here—on the merits; but in point of law it was apparent that so far as the limited company was concerned this conviction must for the reasons indicated be quashed.

A further point was raised with reference to Glover. The points were taken on his behalf, first that the judge in his summing-up omitted to direct, or sufficiently to direct, the jury on the distinction between the case of the company on the one hand and the case of the individual on the other. One could not help thinking that the distinction between the two had assumed a new importance since it was apparent or probable that the company was about to succeed on what had been called an attractive technicality; but, however that might be, looking at the summing-up of the learned judge as a whole it was the opinion of the Court that he clearly put to the jury the real question with regard to Glover.

Upon the admissions of Glover himself it appeared clear that he took an actual personal part not merely in the distribution but in the very posting of these sheets. It was said that it was part of his normal task, but it was one thing to issue posters for purposes of the kind specified and another thing—although that purpose might be collateral—to issue posters which came within the words "advertisements, circulars, or publications for the purpose of promoting or procuring the election of a candidate for a

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Parliamentary election." It was apparent to anyone who read the evidence that there was ample material on which the jury could find that Mr. Glover, with full consciousness of what he was doing, was a party to the purpose which was being served, and did the acts of which complaint was made.

Finally, it was said that as the company had succeeded in escaping conviction on the ground already stated, and as Glover was charged only as aider and abettor, it followed of necessity that his conviction must be quashed. In the opinion of the Court that was not the case. He was charged as aider and abettor no doubt, but he was charged with having taken part in doing these acts. He was a principal, and there was no reason in the opinion of the Court for interfering with the conviction so far as he was concerned. The result was that so far as the company was concerned the conviction was quashed, and Mr. Glover's appeal was dismissed.

Sir John Simon referred to s. 34 of the Representation of the People Act, which gave the Court power to mitigate or entirely to remit any of the incapacities imposed by the Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), s. 6. He said that he apprehended that the view likely to be taken was that it would not be reasonable to deprive Glover of his rights as a voter or his rights to hold any public office for seven years.

The LORD CHIEF JUSTICE said that the Court was not disposed to give any assistance in that matter. The Act had provided with a very clear purpose that persons were not to incur expense of this kind except subject to the proper conditions, and the Court regarded it as a serious matter.

Conviction of one appellant quashed.
One appeal dismissed.

Solicitors for Appellants—*Michael Abrahams, Sons & Co.*
For Respondents—*Lewis & Lewis.*

W. D. T.

BEFORE

TEH LORD CHIEF JUSTICE, MR. JUSTICE SHEARMAN AND MR. JUSTICE SALTER.

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27 *March.*

ALFRED PILLEY.

If the police confront accused persons under arrest, nothing should be done to invite a reply from one implicated by the statement of another.
Grayson, 16 *Cr. App. R.* 7, 1921, *followed.*

Applicant was convicted at the Lancashire Salford Hundred Sessions on 20th February, 1922, of breaking and entering, and was sentenced by the Chairman to eighteen months' imprisonment with hard labour. He applied for leave to appeal against his conviction and sentence.

Applicant was not present, and was not represented.

SHEARMAN J.: The applicant was concerned in two burglaries, and the Court thinks he should have leave to appeal. The applicant, on being arrested, was charged and denied the offence. Subsequently three other men were also arrested for the same offence, and then a fourth man. When these other men were charged, applicant was brought into their presence by the police. Two of the other defendants made statements against the applicant. These two accused admitted guilt, and the applicant made the remark, "That's right," which he says was not an admission of guilt, but an observation on their confession.

This Court has already, in the case of *Gardner and Hancox*, 114 L. T. 78; 32 T. L. R. 97; 85 L. J. K. B. 206; 80 J. P. 135; 25 Cox C. C. 221; 11 Cr. App. R. 265: 1915, pointed out the undesirability of the police having present a person already charged with an offence when subsequently charging other persons with that offence. Therefore leave to appeal will be granted to enable the conviction to be discussed.

Leave to appeal granted.

J. W. F

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Elliot Gorst for appellant (under s. 10 of the Criminal Appeal Act), who was present, stated the facts. He was stopped by the Court.

J. H. Thorpe for the Crown. There was some evidence, but very little to support this conviction apart from the alleged admission.

The LORD CHIEF JUSTICE: This case was quite properly tried by the learned Chairman, and his summing-up was excellent. But, as was held by this Court in *Gardner and Hancox* (above), a practice on the part of the police of confronting one prisoner with another, and so obtaining a confession or admission from either, would be most reprehensible. It is contrary to the Memorandum approved by the judges of the King's Bench Division in 1912 (*a*), with reference to the statements of prisoners in the custody of the police. The Memorandum says that an accused person should be furnished with a copy of the statements of other accused persons, but that nothing should be done to invite a reply. If the accused person is "desirous of making" any reply, the usual caution should be administered.

There was very little evidence against the appellant beyond the fact that he said "That's right" (*b*). This statement, ambiguous in itself, is not absolutely inadmissible, but according to the practice of this Court a conviction obtained by improper means will not be upheld without other evidence which must inevitably have resulted in convicting the appellant. There is no such evidence here, and the conviction cannot stand.

Conviction quashed.

W. D. T.

(*a*) See Roscoe's Criminal Evidence, 14th ed., p. 51; Stone's Justices' Manual, 54th ed., 1922, p. 1576 (Appendix); 145 L. T. Journal, 389; 53 L. Journal, 325, September 28th, 1918. See *R. Reid*, p. 161, below.

(*b*) Cf. *W. H. Page's Case*, 12 Cr. App. R. 191: 1915.

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GEORGE HARRY ROBINSON.

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A judge is not bound to disclose a document from the jury purporting to contain a verdict which he does not accept.

The rule about the judge's direction on manslaughter in a trial for murder is correctly laid down in T. Clinton, 12 *Cr. App. R.* 215: 1917.

Appeal against conviction on law.

Appellant was convicted at the Leeds Assizes on 21st March, 1922, before Mr. Commissioner Ashton, K.C., of the wilful murder of his wife, and was sentenced to death.

A. S. Matthews for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. It is submitted that the verdict was against the weight of the evidence, which pointed equally to the suicide of the deceased. The learned Commissioner failed to put to the jury the possibility of an alternative verdict of manslaughter. The jury having retired to deliberate, returned into Court with a document which they handed to the Commissioner, who, in spite of counsel's objection, did not disclose its contents at the time. A copy of such document has now been furnished for the purposes of this appeal. It is as follows:—

"Verdict, guilty. The jury are unanimous that he caused the death of his wife by cutting her throat with a razor. This was done without premeditation, in a fit of temper under provocation. The jury strongly recommend him to mercy."

This document, being in substance the verdict of the jury, should have been disclosed at the time. "In all capital cases" a verdict must be given openly and in open Court. *Hawkins,* 4 P. C., B. 2, c. 47, s. 2 (edn. Leach), citing Co. Lit. 227; 3 Inst. 110; 2 Hale P. C. 300, &c.; (*Sir Thomas*) *Raymond,* 193 (*a*). This finding of the jury was tantamount to one of manslaughter. The possibility of a verdict of manslaughter should have been left in terms. *Hopper,* 1915, 2 K. B. 431; 84 L. J. K. B. 1371; 113 L. T. R. 381; 79 J. P. 335; 11 Cr. App. R. 136.

Grotrian for the Crown was not called upon.

(*a*) *Ladsingham* in 1671.

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The LORD CHIEF JUSTICE, after stating the effect of the evidence: The Court is of opinion that there was overwhelming evidence on which the jury were entitled to say (as they ultimately did) that they were satisfied beyond all reasonable doubt that the appellant had killed his wife in circumstances which made the killing murder. The learned Commissioner did nothing he ought not to have done. The jury evidently desired further direction, which he proceeded to give. There is no real objection to the summing-up. It is plain that the Commissioner was of opinion that there was no evidence to go to the jury on the question of manslaughter. That being so, he (the Commissioner) was bound to decline to put the question of manslaughter to the jury. Where there is no evidence of manslaughter, the question should not be left to the jury, as was laid down in this Court in *Phillis,* 32 T. L. R. 414: 1916; and again in *Thomas Clinton,* 12 Cr. App. R. 215: 1917. The Commissioner rightly refrained from leaving the question of manslaughter to the jury in this case. The conviction must therefore stand.

Appeal dismissed.

W. D. T.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SHEARMAN AND MR. JUSTICE SANKEY.

1922
12 *April.*

ARTHUR DAVIES.

Severity of sentence.

The appellant was convicted on March 14th, at the Cardiff Assizes, of shop-breaking, and was sentenced, by Acton J., to five years' penal servitude. He applied to be present, and appealed from an order of Lush J. refusing (a) leave to appeal against sentence, and (b) legal aid.

SHEARMAN J. said that this young man was only 25, and, although there had certainly been previous convictions, the sentence of five years' penal servitude was severe. The Court thought that the matter ought to be considered, and therefore leave to appeal against the sentence would be granted.

Leave to appeal granted.

W. E. H.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SHEARMAN.

ARTHUR DAVIES.

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Appellant in person.

The LORD CHIEF JUSTICE: When the appellant was arrested he said, "I will have to give in now." He pleaded guilty to this indictment. Although only 25 years of age he is not new to crime. He was convicted in 1919 of larceny, and sentenced to six months' imprisonment with hard labour. In 1920, for robbery with violence, he was sentenced to eighteen months' imprisonment with hard labour, and twenty strokes of the "Cat." In 1914 he had joined the army and served overseas. After being wounded he deserted, and subsequently joined the navy. He has committed serious offences and received severe punishment. On the whole, the opinion of the Court is that the sentence of five years' penal servitude ought to be reduced to one of eighteen months' imprisonment with hard labour, in the hope that the leniency now shown will not be thrown away.

Sentence reduced.

W. D. T.

HAROLD EDWARD AND BLANCHE ANNIE PRIESTLEY.

Appeals are within the words "all proceedings" in the Punishment of Incest Act, 1908, 8 *Ed.* 7, *c.* 45.

Appeals against sentence by leave of Lush J.

The appellants, H. E. P. (aged 17), and B. A. P. (aged 19), brother and sister, were convicted on 21st March, 1922, at the

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Leeds Assizes, before Mr. Commissioner Ashton, K.C., of incest, and were sentenced respectively to twelve months' and fifteen months' imprisonment with hard labour.

G. D. Roberts for the appellants, who were present.

The LORD CHIEF JUSTICE: Have you considered the provision of s. 5 of the Punishment of Incest Act, 1908, 8 Edw. 7, c. 45: "All proceedings under this Act are to be held *in camerâ*"?

Roberts: It is submitted that the provision only applies to the Court of trial, the proceedings on appeal being under the Criminal Appeal Act, 1907.

The LORD CHIEF JUSTICE: Whatever view may be taken of the policy of this provision, or of the wisdom of retaining it, there seems to us to be no escape from the clear words of the statute. The proceedings, both in this Court and in the Court of trial, are "proceedings under this Act," inasmuch as but for the Act there would be no punishable crime, and no matter for review in this Court. We have, therefore, no option but to direct the Court to be cleared.

The LORD CHIEF JUSTICE: The *official* reporters may remain.

Roberts was heard on the merits.

The LORD CHIEF JUSTICE: We have read the papers, and are all of opinion that this sentence should be reduced. Have you anything to add to assist us on the question of the proper modification in this particular case?

Roberts: Looking at the age of the appellants, who were respectively only 15 and 17 at the date of the offence, and at the surroundings in which they lived, it would seem that they offended as the result of ignorance and defective training. They are thus deserving rather of pity than of punishment. Moreover, they are, both of them, first offenders, with nothing against the character of either (*Milner and Atkin,* 15 Cr. App. R. 18: 1920), so Borstal

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treatment would be unsuitable. Might it not be thought sufficient to bind them over?

No counsel appeared for the Crown.

The LORD CHIEF JUSTICE: It is obvious when we look at the circumstances in which these young people—not much more than children at the time of the offence—lived, that there were certain opportunity and temptation offered. They are certainly deserving of pity, but of some punishment as well. We hold that the sentences should be reduced in each case, without distinction, to one of imprisonment in the second division for the term of six calendar months, to run from the date of conviction.

Sentences reduced.

W. D. T.

Solicitors for Appellants—*Jaques & Co.*, Agents for *Armitage, Sykes & Hinchcliffe*, Huddersfield.

JOHN HOWARD (*a*).

Ex-convict not reporting to the police; severity of sentence.

Applicant was sentenced on April 12th, at the Bath City Quarter Sessions, to nine months' imprisonment with hard labour for failing to notify, as a convict on licence, his residence to the police. On his release from penal servitude he had duly reported, but on November 22nd, 1921, he was sentenced to a month's imprisonment for stealing from an offertory box: that conviction forfeited his licence and made him liable to serve the *remanet*. On April 10th, 1922, he was sentenced to three months' imprisonment with hard labour for larceny, and while undergoing this term the present charge was brought: the nine months were concurrent with the three, at its expiration he must serve the *remanet*.

Leave to appeal against sentence granted.

(*a*) See p. 161.

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CHARLES HENRY WILLETT.

Non-direction.

A grave omission to direct the jury on a vital point of law cannot be made good merely by counsel's calling attention to it at the termination of the summing-up.

Appeal against conviction and sentence, by leave of Swift J.

Appellant was convicted, at the Quarter Sessions for the Liberty of Ripon, on 8th April, 1922, of larceny, and sentenced to nine months' imprisonment with hard labour.

Diamond, for the appellant (who was not present).

Appellant was barrack-warden at Ripon Camp, and in charge of the stores. The charge against him was that he appropriated and sold 350 Army blankets, valued at £225, after the Inniskilling Dragoons had left for York. His case was that he sent the blankets to York to make up a deficiency. Evidence was improperly admitted of a statement by one McCormack, who was jointly indicted with the appellant and pleaded guilty. The lay Chairman's summing-up was quite inadequate and defective. In particular, he never directed the jury that McCormack's statement was no evidence against appellant. Such things are typical of these particular Sessions.

Arthur Morley for the Crown.

It cannot be contended that the summing-up was adequate. It was, moreover, almost inaudible. There was no official shorthand writer present, and a local newspaper reporter was requested to take a note. There was no material omission in the report of the summing-up.

The Lord Chief Justice: The transcript of the shorthand note is not what it should be. For the first time, in my short experience here, I find an incomplete and inaccurate note. It appears from the statements of both counsel that, although the reporter was not at first intending to take any note of the summing-up, he did, when attention was directed to the matter, take some sort of note. After McCormack had pleaded guilty, it became a matter of vital importance that the jury should be told by the

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Chairman of Quarter Sessions that the statement made by McCormack was not evidence against the appellant. In the report of the summing-up there are no words to that effect. It is now said that, when the summing-up had come to an end, counsel for the defence (not for the first time) submitted this point, and that, in the words used to-day by counsel for the prosecution, "the Chairman indicated his agreement with that submission." It is one thing to indicate agreement; it is another to direct a jury effectively. It is clear—so far as from the record of these proceedings anything can be said to be clear*—that there was no sufficient direction to the jury on a cardinal matter in the case. The conviction must be quashed.

Conviction quashed.

Solicitor for the Appellant—*J. W. Heddon*, Ripon.

W. D. T.

JOHN ARMSTRONG.

Verdict against the weight of evidence in the opinion of majority of the Court.

Appeal against conviction and sentence, by leave of Swift J.

Appellant was convicted, at the Cardiff City Sessions, on 12th April, 1922, before the Deputy-Recorder (Ivor Bowen, K.C.), of larceny, and sentenced to nine months' imprisonment with hard labour.

R. Hopkin Morris, for the appellant (under s. 10 of the Criminal Appeal Act), who was not present.

Langman for the Crown.

The LORD CHIEF JUSTICE: The appellant was jointly indicted with one Thompson for stealing and receiving a suit-case and its contents, and both were convicted.

The question really appears to be whether the evidence (reducible, in the case for the appellant, to the possession of a shaving-

* See *per* Lord Trevethin, C.J., on the imperative need for full shorthand notes, p. 116, above.

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JOHN ARMSTRONG.

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brush and soap) was evidence upon which the jury might reasonably convict; or to put it in another phrase, whether it was safe to convict the appellant in this state of the evidence.

The members of the Court have discussed the matter a good deal, and it is right to say that we are not unanimous. But in such a case the majority prevail, and according to the decision of the majority, the verdict could not reasonably have been arrived at. In the result, the appeal is allowed, and the conviction quashed.

Conviction quashed.

W. D. T.

JOHN FENWICK ERRINGTON.

No count can be added to or amendment made in a bill of indictment without the consent of the Court of trial.

Appeal against conviction and sentence, by leave of Swift J.

Appellant was convicted, at the Leeds City Sessions, on 12th April, 1922, before the Assistant-Recorder (George Glover Alexander, Esq.), of obtaining money by false pretences, and sentenced to nine months' imprisonment with hard labour.

J. R. Macdonald, for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. In this case, after the Grand Jury had found a true bill against the appellant at the January Sessions, the indictment was amended at the April Sessions by adding a fresh count, charging wholly new false pretences, the amendment being made after appellant had been arraigned on the indictment and had pleaded not guilty.

[The LORD CHIEF JUSTICE: reading from the indictment. The note of the amendment is signed "A. Copson Peake." Who is he ?]

He is the Clerk of the Peace. It is submitted that the Indictments Act, 1915 (5 & 6 Geo. V. c. 90), s. 5, sub-s. (1), has been contravened.

[AVORY J.: This particular clause was designed to prevent the very thing which has been attempted here.]

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J. H. Thorpe for the Crown, could not defend the added count upon which the appellant had never been arraigned, and to which he had never pleaded.

The LORD CHIEF JUSTICE: The power to amend an indictment is given by the statute, which provides that an indictment may be amended by the Court, if it appears to be defective; unless, having regard to the merits of the case, the amendment cannot be made without injustice. The amendment made in this case was a profound irregularity. It exhibits the two main faults against which the statute was directed. It was *not* made because the indictment was defective, and it *was* one which could not, at that stage, be allowed without injustice. The appellant could not possibly prepare a defence to the second charge, the preferring of which was calculated to do him grave injustice. It is quite obvious that such a way of dealing with an indictment was not only bad, but fatal, and the conviction must consequently be quashed.

Conviction quashed.

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On a trial for homicide evidence may be given that the defendant at the time of his arrest had in his possession means of causing death of the same nature as those charged and that he intended to use those means feloniously, whether he be indicted for the alleged felony or not.

It is improper for a juror to communicate the deliberations of the jury, or for anyone to publish such a communication.

Appeal against conviction on law.

Appellant was convicted at the Hereford Assizes, on 13th April, 1922, after a trial lasting ten days, before Darling J., of the wilful murder of his wife, and was sentenced to death. The Grand Jury had returned two true bills against the appellant: (1) for

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the murder of his wife on 22nd February, 1921; and (2) for the attempted murder of Oswald Norman Martin on 26th October, 1921, in both cases by arsenical poisoning. The appellant was arraigned on the former indictment.

The notice of appeal stated, *inter alia,* the following grounds of appeal:—

(1) That Darling J. wrongly permitted evidence to be given that tended to show that the prisoner had administered poison to one Martin, with intent to murder him.

(2) That the learned judge misdirected the jury on the effect of such evidence, and on the way in which it should be applied.

(3) That the learned judge misdirected the jury about the grounds on which the said evidence was admissible, if admissible at all.

The other grounds of appeal alleged misdirection in certain particulars on the whole case.

There was also an application to call further evidence, which was refused.

Sir Hy. Curtis-Bennett, K.C. (with him *S. R. C. Bosanquet* and *E. A. Godson*) for the appellant, who was not present. After narrating the history of the case counsel proceeded: the most important point in this appeal is the question of the admissibility of the evidence relating to the alleged attempt to poison Martin eight months after the death of the appellant's wife. Martin is a solicitor at Hay. The appellant also practised there, and held public appointments. Their professional relations necessarily became occasionally strained. The allegation was that on 26th October, 1921, when Martin was the appellant's guest at tea, the appellant supplied him with food which had been poisoned with arsenic; and that Martin afterwards developed symptoms of arsenical poisoning. At the trial, on the first day, the Attorney-General claimed to open the facts of the Martin case to the jury. Whereupon the matter of law was argued by counsel in the absence of the jury; and Darling J., after argument, decided to admit the opening, and the evidence in support. It is submitted that the decision was wrong. Evidence of this kind can only be admitted to prove (1) intent, (2) that the act alleged was part of a system, or (3) to rebut a defence of accident. No act

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was alleged which could be dealt with on either of these grounds. The learned judge's direction could not be supported by the decided cases for the last seventy years. The decisions have been somewhat fluctuating. It is therefore thought best to consider them in chronological order, whichever way they tend.

Counsel proceeded to cite and discuss the following cases:— *Geering,* 18 L. J. Rep. (N. S.) M. C. 215: 1849; *Winslow,* 8 Cox, C. C. 397: 1860; *Garner and Wife,* 4 F. & F. 346: 1864; *Cotton,* 12 Cox, C. C. 400: 1873; *Heeson,* 14 Cox, C. C. 40: 1878; *Flannagan and Higgins,* 15 Cox, C. C. 403: 1884; *Thomas Hall,* 5 New Zealand L. R. 93: 1887; *Makin* v. *A.-G. for New South Wales,* 1894, App. Cas. 57; 63 L. J. P. C. 41; 58 J. P. 148; 69 L. T. Rep. 778; 17 Cox, C. C. 704; *Rhodes,* 1899, 1 Q. B. 77; 79 L. T. Rep. 360; 19 Cox, C. C. 182; *John Bond,* 1906, 2 K. B. 389; 75 L. J. K. B. 693; 54 W. R. 586; 95 L. T. Rep. 296; 70 J. P. 424; 21 Cox, C. C. 252; *Wm. Hy. Ball and Sister,* 1911, App. Cas. 47; 80 L. J. K. B. 691; 103 L. T. Rep. 738; 75 J. P. 180; 22 Cox, C. C. 366; 6 Cr. App. R. 31; *Rodley,* 1913, 3 K. B. 468; 82 L. J. K. B. 1070; 109 L. T. Rep. 476; 77 J. P. 465; 9 Cr. App. R. 69; *William Barron,* 24 Cox, C. C. 83: 1913; 110 L. T. Rep. 350; 78 J. P. 184; 9 Cr. App. R. 236; *Boyle and Merchant,* 1914, 3 K. B. 339; 111 L. T. Rep. 638; 24 Cox, C. C. 406; 10 Cr. App. R. 180; *Perkins* v. *Jeffery,* 1915, 2 K. B. 702; 84 L. J. K. B. 1554; 113 L. T. Rep. 456; 79 J. P. 425; 25 Cox, C. C. 59; *George Joseph Smith,* 84 L. J. K. B. 2153; 25 Cox, C. C. 271; 11 Cr. App. R. 229: 1915; *Arthur Thompson,* 1918, App. Cas. 221; 87 L. J. K. B. 478; 118 L. T. Rep. 418; 82 J. P. 145; 26 Cox, C. C. 189; 13 Cr. App. R. 61.

Here there was no evidence that the appellant ever gave his wife arsenic, or ever gave her food or drink.

[The LORD CHIEF JUSTICE: But there was ample evidence of opportunity.]

There was opportunity; but it was consistent with innocence. Where the accused gives a simple denial, it does not matter whether the death was caused by suicide or by a third party. There is no difference in principle between a case of alleged poisoning and one of death by violence. Here it was stated at

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the outset that the defence put forward the theory of suicide by arsenical poisoning.

[The LORD CHIEF JUSTICE: Then the case was open to three defences: accident, suicide, or poisoning by some other person?]

Yes. But the Martin evidence was only admissible on one of three grounds: (1) to prove intent; or (2) a system; or (3) to rebut a defence of accident.

[AVORY J.: Can there be evidence in rebuttal of a suggestion in counsel's speech?]

Yes; as in the recent case, in this Court, of *William Sullivan*, 16 Cr. App. R. 121: 1922.

[The LORD CHIEF JUSTICE: Does it matter, if the evidence was admissible in law, on what ground it was in fact admitted?]

Yes; the existing rules of law must be enforced.

[SHEARMAN J.: Your argument is: Such evidence is inadmissible *per se*, but a particular defence may make it admissible.]

Precisely. It is only where the Crown has brought itself within the exceptions that it can be admissible. If this evidence be admissible, the exceptions will have eaten up the common law rule that, on one indictment evidence cannot be given of the facts relating to another.

In considering *Geering*, it must be remembered that in 1849 medical knowledge in detecting poisons was not very far advanced; and that (as appears from the head-note) the evidence was there admitted to prove that the deceased husband actually died of arsenic. In *Hall* the facts were very similar to those of the present case, though, as a decision of the New Zealand Courts, it is not strictly binding here. The same may be said of *Shaffner* v. *Commonwealth*, 13 American Reports, 649: 1872, which was a decision of the Supreme Court of Pennsylvania on similar facts in the same sense. In *Makin's Case*, Lord Herschell C., giving the

opinion of an undoubtedly strong tribunal, laid it down that it is not competent for the prosecution to adduce evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely, from his criminal conduct or character, to have committed the offence for which he is being tried.

[AVORY J.: Can you systematically commit crime without design? System must include design.]

If the defence here had been an *alibi*, this evidence could not have been admitted in rebuttal. There must be a *nexus* between the two occurrences, so as to make them part of one transaction.

[The LORD CHIEF JUSTICE: *Makin's Case* seems to establish the authority of *Geering*, and to shake that of *Winslow*.]

Rhodes shows that evidence of isolated transactions is inadmissible. *John Bond* is strongly in the same sense, especially the passage from the judgment of Kennedy J. (at 1906, 2 K. B. 397): "It is of the utmost importance to him [defendant] that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, &c."

[AVORY J.: In opening to the jury, you said that the appellant was not being tried for the attempt to poison Martin.]

I was dealing with the opening of the Attorney-General, and I had to accept the ruling of the learned judge. The jury were surprised to hear that they were not trying the Martin case.

In *Arthur Thompson*, Lord Sumner said that an issue must have been raised in substance to which the prejudicial evidence is relevant. It is submitted that this was not the case here.

The learned judge's summing-up, on the admission of the Martin evidence, amounted to misdirection, especially in the passage commencing: "If you come to a conclusion that he did give it [arsenic], why then it has a bearing as showing what he had got in the way of poison, and what he was prepared to do with it; as showing that he was prepared not merely to use it on

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dandelions and things of that kind, but that he was prepared to use it on a human being."

Counsel proceeded to deal with the alleged misdirection in other particulars, stated as grounds of appeal, and finally called attention to the conduct of a member of the jury in giving an "interview" for publication in the press about the final deliberations of the jury. The making of such a statement, and the publication of it, has added a great deal to the misery of those connected with the prisoner, which was heavy enough already.

The *Attorney-General* (with him *Vachell, K.C.*, and *Micklethwait*) for the Crown, was called upon to confine his argument (1) to the admissibility of the Martin evidence, and (2) to the impugned portion of the summing up relating thereto.

The Martin evidence was relevant to the issue whether appellant's possession of arsenic was innocent or not.

It might suffice to refer to the single case of *Arthur Thompson* and to the words of Lord Sumner therein. This case, like that, raises no new principle of law, it elucidates no new aspect of familiar principles. The decisions for the last seventy years have been fairly cited. Now the case law is over 100 years old, dating from 1817, in the days of Lord Ellenborough.

[AVORY J.: If *Geering* is good law, this case is *à fortiori*.]

Yes. See also *Makin's Case* (especially *per* Windeyer J., in 14 New South Wales L. R. at p. 20).

[SHEARMAN J.: *John Bond* seems to be the nearest to this, as there was there only one other isolated case.]

It is difficult to understand exactly what is meant by *nexus*.

[The LORD CHIEF JUSTICE: Suppose you say "link."]

In *Ball's Case*, L. Loreburn C. said that certain evidence which was obviously admissible had been given to establish opportunity, and raise an inference of guilt—that the defence of innocent living together ought to fail; and it was held in the House of Lords,

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on the authority of *Makin's Case*, that further evidence of previous guilty relations was admissible.

Lovegrove, 1920, 3 K. B. 643; 15 Cr. App. R. 50, carried things still further. It was there held in this Court that on a trial for illegal operation an accomplice's evidence of a previous operation could be given. See *per* Lord Reading C.J.

All the cases justify the view that, in this case, a relevant question was whether the possession by the appellant of arsenic was legitimate and innocent, or not.

[The LORD CHIEF JUSTICE: Was it ever suggested on the part of the defence that Mrs. Armstrong was trying to commit suicide by gradual poisoning?]

No. The appellant said, in cross-examination, that he had no fear of his wife committing suicide when she came out of the asylum.

He was stopped by the Court.

Curtis Bennett, in reply. In my submission, *Lovegrove* has no bearing on the present case.

The LORD CHIEF JUSTICE: We are unanimously of opinion that this appeal must be dismissed.

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The Lord Chief Justice delivered the following written judgment:—

In this case the appellant was convicted before Mr. Justice Darling, at the Hereford Assizes, on April 13th last, of the murder of his wife, and was sentenced to death. He appeals against conviction, and the points of substance raised by the notice of appeal are: (1) that evidence of an attempt to poison one Oswald Norman Martin, some eight months after the death of the appellant's wife, ought not to have been admitted; and (2) that on that evidence the learned judge misdirected the jury. There is no need to repeat the facts in detail. It is enough to say that, in the opinion of this Court, the evidence was amply sufficient to justify the verdict of the jury, even though nothing relating to Martin

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were taken into consideration. That evidence proved, among other things, that the appellant's wife died on February 22nd, 1921, of arsenical poisoning; that a fatal dose of arsenic was administered to her within twenty-four hours of her death; that she suffered from the same kind of poisoning both in August, 1920, before her removal to an asylum, and in February, 1921, soon after her return home; that the appellant purchased arsenic shortly before each of those occasions; that he was the only person who, on both occasions, had the opportunity of administering arsenic to his wife; and that his possession of arsenic, made up in small packets of fatal doses, including the packet found upon him at the time of his arrest, was not consistent with any legitimate purpose.

The evidence further went to show that he had a twofold motive for murder—namely, the desire to obtain the benefit to be derived under a new will made by his wife in July, 1920, and the desire to contract another marriage. The suggestion that his wife committed suicide was refuted, not only by the words which she used on more than one occasion towards the end of her illness, but also by her physical condition, which, for a considerable time before her death, made it impossible for her to leave her bed.

On the question of the admissibility of the evidence relating to Martin, it is to be observed that the decision in *Geering*, 18 L. J. M. C. 215: 1849, was established as an unquestionable authority by the decision in *Makin* v. *A.-G. for New South Wales*, 10 T. L. R. 155; 1894, A. C. 57. The only difference between *Geering's Case* and the present case is that, while in *Geering's Case* there was evidence of the actual administration of food which might have contained arsenic, in the present case there was evidence of the opportunity for such administration, strengthened by evidence of possession of arsenic by the appellant at the material times, a fact which does not appear in the report in *Geering's Case*.

In the opinion of this Court, it would suffice to say that on the authority of *Geering's Case* the evidence which is here complained of was admissible. But it is suggested that, in the absence of direct evidence of some act done by the appellant towards the commission of the crime with which he was charged, evidence about the subsequent attempt on the life of Martin in October, 1921, was inadmissible, because at an early stage of the trial counsel

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for the appellant stated that the defence would be that Mrs. Armstrong committed suicide by taking arsenic, and that no defence of accidental poisoning would be raised. Counsel for the appellant, it may be added, in his argument before this Court, very properly stated that he sought to make no point of the fact that the events relating to Martin were subsequent to the death of the appellant's wife; and, moreover, that the lapse of time, between February and October, 1921, was immaterial.

Now, in the opinion of the Court, a statement given by counsel at an early stage of the case about the defence upon which he proposes to rely cannot preclude the prosecution from offering any necessary evidence to show that the accused committed the crime. It was an essential part of the case for the prosecution here to prove that arsenic was designedly administered by the appellant to his wife, and any evidence that tended to prove design must of necessity tend to negative accident and suicide. A few days before her last illness began, the appellant's wife had been brought home from the asylum at the request, and in consequence of the diligent negotiations, of the appellant himself. The evidence showed that those negotiations and requests began on or about January 10th, 1921, and that on January 11th the appellant purchased a quarter of a pound of white arsenic and took it home

With what design did he make that purchase, and provide himself at that particular time with that poison? Was it for the innocent purpose of destroying weeds, or for the felonious purpose of poisoning his wife? The fact that he was subsequently found, not merely in possession of, but actually using for a similar deadly purpose, the very kind of poison that caused the death of his wife was evidence from which the jury might infer that that poison was not in his possession at the earlier date for an innocent purpose, and such use of the same poison is more cogent than the mere fact of death from the same poison, as in *Geering's Case*. See *Thompson*, 34 T. L. R. 204; 1918, A. C. 221, and the illustrations there given.

Reference was made in the argument in the present case to the case of *Perkins* v. *Jeffery*, 1915, 2 K. B. 702; 31 T. L. R. 444. But the decision in that case was not inconsistent with the decision in *Boyle and Merchant*, 1914, 3 K. B. 339; 30 T. L. R. 521. Lord Reading was a party to both decisions, and the decision in

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Boyle and Merchant (above) was cited in support of the later decision. The distinction is that in *Perkins* v. *Jeffery* (above) identity was in dispute, and, until that was established, evidence of design or intention was not relevant. In the opinion of the Court, *Geering's Case* (above) and *Garner*, 4 F. & F. 346: 1864, are not so strong as the present case, and the facts of the present case are stronger in favour of the admission of the evidence complained of.

There was the clearest possible evidence that the appellant, on January 11th, 1921, purchased a quarter of a pound of white arsenic, and that when he was arrested on December 31st, 1921, he had in his pocket a packet containing a fatal dose of white arsenic. In these circumstances, so soon as he stated the defence, as he did at once, that he bought and was keeping the poison for the innocent purpose of destroying weeds, it was open to the prosecution to show by means of the evidence relating to Martin that the appellant neither bought nor kept the poison for that pretended innocent purpose. The question which is involved here, as Lord Sumner said in *Thompson's Case*, 34 T. L. R. 204; 1918, A. C. 236, "raises no new principle of law; it elucidates no new aspect of familiar principles. It is a mere question of the application of the rules of evidence to this particular case."

On the summing-up of the learned judge, exception was taken to the passage:—

"I came to the conclusion that Martin's case has a bearing upon this. What is the bearing? The bearing is this: That it is of value as showing that the defendant had arsenic in his possession, and that he would use it to poison a human being. Let me say at once, if he is not proved to have given arsenic to Mr. Martin with intent to injure him and kill him, if you come to the conclusion that he did not do that, then all the evidence in Martin's case has no bearing whatever upon this case—none at all. But if you come to the conclusion that he did give it, why, then, it has a bearing, as showing what he had got in the way of poison and what he was prepared to do with it; as showing that he was prepared, not merely to use it on dandelions and things of that kind, but that he was prepared to use it on a human being if he had what to him appeared sufficient reason to do so."

If that passage meant, or, in the circumstances, was likely to be understood to mean, that the appellant was a man who was in

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the habit of committing, and might be expected to commit, this particular crime, then it would obviously be a misdirection, and the proviso to s. 4 of the Criminal Appeal Act would have to be considered. But it is difficult to imagine that the learned judge, with or without the authorities before him, intended to convey any such thing. To any intelligent person who was present at the trial, or who has read the transcript of the evidence, the speeches of counsel, and the summing-up, it must be obvious that the particular passage was directed to the plain question that had emerged—namely, did the appellant buy and keep this poison, as he alleged, for the innocent purpose of destroying weeds, or did he buy and keep it, as the prosecution alleged, for a felonious purpose? Nothing is less useful in such a controversy than to take a particular sentence from the whole of a voluminous context, and to approach its examination for the purpose of establishing a certain criticism. The proviso to s. 4 of the Criminal Appeal Act does not, in the opinion of the Court, arise. But in any event it was the evidence, and not the reason for its admission, that must have influenced the jury; and we are clearly of the opinion that the jury in this case would certainly have returned the same verdict, even if the summing-up had not contained the passage to which reference has been made.

In these circumstances this appeal is dismissed.

It remains to mention a separate matter. Reference has been made in the course of the argument to the fact that, after verdict, there appeared in some newspapers an account of what the writer said was said to him about the evidence, with a complete lack of reserve, by a member of the jury. Whether what was published was in fact said is not certain. But it is at least certain that it was published. In the opinion of this Court, nothing could be more improper, deplorable, and dangerous. It may be that some jurymen are not aware that the inestimable value of their verdict is created only by its unanimity, and does not depend upon the process by which they believe that they arrived at it. It follows that every juryman ought to observe the obligation of secrecy which is comprised in and imposed by the oath of the grand juror. If one juryman might communicate with the public upon the evidence and the verdict, so might his colleagues also; and, if they all took this dangerous course, differences of individual opinion might be made manifest, which, at the least, could not

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fail to diminish the confidence that the public rightly has in the general propriety of criminal verdicts. Whatever the composition of a British jury may be, experience shows that its unanimous judgment is entitled to respect. That respect, with all that it involves, is not lightly to be thrown away; and it is a matter of supreme importance that no newspaper and no juryman should again commit the blunder, to use no harsher word, which has disfigured some of the reports relating to matters connected with the trial of this case.

Appeal dismissed.

Solicitors for the Appellant—*Walls, Stallard & Co.*, for *T. A. Matthews,* Hereford.

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE GREER AND MR. JUSTICE ACTON.

JOHN HOWARD (*a*).

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Appellant in person.

The Court was satisfied that appellant's statement that he had duly reported at Portsmouth on October 20th, 1921, and that after his conviction on November 22nd, he was afraid to report to the police at Bath, and reduced the term of nine months to one month, to date from conviction.

Sentence reduced.

ROBERT REID.

This case arose out of the facts in *Alfred Pilley* (above, p. 138); the appeal being two months out of time, the Court granted an extension.

Eliot Gorst, for appellant (under s. 10 of the Criminal Appeal Act), stated the facts.

Thorpe, for the Crown, thought that the admission in this case was much stronger than in *Pilley's*, but was not prepared to say that in the absence of that statement the jury *must* have convicted.

The LORD CHIEF JUSTICE: His words were ambiguous.

Conviction quashed.

(*a*) See p. 145.

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CHARLES CAMELLERI.

In charges of sexual offences with males, the general rule about the reception in evidence of the fact that the male complained and of the contents of such complaint is the same as in the case of females. Beatty *v.* Cullingworth, 60 *J. P.* 740: 1896, *explained.*

Appellant was sentenced, after two days' trial at the Liverpool Assizes, by Roche J., to five years' penal servitude for sodomy and an indecent assault on a male person. He appealed against conviction on a point of law.

Blackledge, for the appellant (under s. 10 of the Criminal Appeal Act), who was present. Shortly, the point of law is that the indictment alleging offences with two boys; on the trial of that concerning one, evidence of the father and the mother of the other boy was admitted that he made a complaint to each of them soon after the alleged act, and that the contents of that complaint were given in evidence, and is expressly based on the special necessity for complaint in cases of rape. This, though admissible in respect of sexual offences against females, has never been the law in respect of males; even in the case of females the law is exceptional and anomalous. *Lillyman*, 1896, 2 Q. B. 167; 65 L. J. M. C. 195; 18 Cox, C. C. 346; 60 J. P. 536; 74 L. T. 730; 44 W. R. 654: C. C. R.; *Osborne*, 1905, 1 K. B. 551; 74 L. J. K. B. 311; 69 J. P. 189; 53 W. R. 494; 21 T. L. R. 288; 92 L. T. 393: C. C. R. In neither of these cases was there a suggestion that the evidence of a male complaint is admissible, and in *Osborne* it is clearly stated that the exception should not be extended.

On the other hand, in *James Folley*, 60 J. P. 569: 1896 (felonious wounding), Hall, Recorder of London, held that the principle of *Lillyman* applied to all cases of violence (and got a conviction thereby). This view was taken in *Chesney* v. *Newsholme*, 1908, P. 301, in the Chancery Court of York by Sir Lewis Dibdin, D.C.L., the judge of that Court, but he drew this conclusion—wrongly—from *Lillyman* and *Osborne*, overlooking the historical basis of those cases. But *Hoodless*, 64 J. P. 282: 1900 (a charge similar to this), Quarter Sessions rightly rejected the complaint.

In *Beatty* v. *Cullingworth*, 60 J. P. 740: 1896 (action for assault), Hawkins J. ruled that *Lillyman* only applied to female cases. And on the whole, Phipson on Evidence, 6th edit., p. 114,

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concludes that such evidence is not admissible in male cases. This Court will not extend so dangerous an exception.

Wooll, for the Crown, referred to the same cases, and to *Christie,* 1914, A. C. 545; 10 Cr. App. R. 141, where this point was raised by the Attorney-General and not carried further.

[The LORD CHIEF JUSTICE referred to Roscoe's Criminal Evidence, 14th edit., p. 28, for *McNamara,* 36 N. Z. R. 392, 1917, where four judges of the New Zealand Court of Appeal, in a case of the present kind, thought that the rule of the female applies to the male cases.

He also called attention to *Jenkinson* in Cape of Good Hope Supreme Court Reports, p. 233, 1904: indecent assault on a female; three judges thought that her complaint—the fact of it as well as its contents—were admissible in evidence as corroboration of her story.]

There is no reason *on principle* for the distinction, even if it be historical. The only true limitation is that adopted by Roche J. in this case—that of age with its corollary of consent as a defence.

Blackledge, in reply.

The LORD CHIEF JUSTICE: The question is, Does the principle in *Osborne's Case* apply here?* In *Lillyman's Case* consent was essential to the defence, but that is not so in *Osborne's Case*. *Beatty* v. *Cullingworth* seems to limit the exception to cases of females, but there the true antithesis is between sexual and non-sexual offences (*not* between female and male). Really till now the question of to-day has not been substantively considered, and we see no reason why in this case either the fact or the contents of the boy's complaint should not be admitted. Perhaps some day the question of the age-limit will have to be considered, but it does not arise here [the boys being fifteen and twelve years old respectively].

As Roche J. thought the point of law here substantial, sentence may date from conviction.

Appeal dismissed.

H. C.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE GREER AND MR. JUSTICE ACTON.

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RONALD TRUE.

When on a trial for murder the only defence is insanity and the only medical evidence called is that prisoner at the time of the felonious act was "certifiably insane," the judge is not bound to direct the jury that they must find a special verdict under s. 2 (1) of the Trial of Lunatics Act, 1883, 46 & 47 Vict. c. 38; the proper direction must follow the rules in McNaughton's Case.

Appeal against conviction on law.

The appellant was convicted, after a five days' trial at the Central Criminal Court, on 5th May, 1922, before McCardie J., of the wilful murder of one Olive Young, and was sentenced to death.

The notice of appeal stated the following grounds of appeal:—

(1) That the verdict of the jury was against the weight of the evidence, and cannot be supported having regard to the evidence.

(2) That the only proper verdict upon the evidence was "*guilty, but insane.*"

(3) That the learned judge misdirected the jury on certain specified particulars.

Sir Henry Curtis Bennett, K.C. (with him *Roland Oliver*), for the appellant, who was not present, recapitulated the facts of the case, as proved in evidence. The verdict was against the weight of the evidence. The proper verdict would have been the special verdict, substituted by the Trial of Lunatics Act, 1883, 46 & 47 Vict. c. 38, s. 2 (1), for the common law one of not guilty on the ground of insanity. Under the Criminal Appeal Act, 1907, s. 5 (4), this Court has power to quash the sentence, and order appellant to be kept in custody, as if a special verdict had been found by the jury. *Jefferson*, 72 J. P. 467; 24 T. L. R. 877; 1 Cr. App. R. 95: 1908; *Gilbert*, 84 L. J. K. B. 1424; 112

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L. T. 479; 24 Cox, C. C. 586; 11 Cr. App. R. 23: 1914. The present appellant was of abnormal mentality from youth; was a chronic morphia-taker; suffered from delusions and homicidal tendencies. The four medical witnesses called, two of them prison doctors, agreed that he was certifiably insane. Their evidence was unshaken in cross-examination. No medical evidence was called in answer by the Crown.

The so-called rule in *McNaughton's Case*, 1843, 10 Cl. & F. 200; 1 C. & K. 130, note (*a*); 8 Scott, N. R. 595; 4 St. Tr. (N. S.) 926 (following a report of the trial), is not exhaustive. Medical science has advanced since then.

[THE LORD CHIEF JUSTICE: In this case, the learned judge did not restrict himself to *McNaughton's Case*, and yet, in spite of that greater latitude, the jury found the accused guilty of murder.]

If a man is certifiably insane, he should not in law be held responsible for his actions. Are the jury, without other evidence, to disregard that of the doctors?

Sir J. F. Stephen, "Criminal Digest," 6th edit. (1904), p. 21, recognises the absence of the power of control as an excuse in law. "No act is a crime if the person who does it is at the time when it is done prevented [either by defective mental power or] by any disease affecting his mind (a) from knowing the nature and quality of his act; or (b) from knowing that the act is wrong; [or (c) from controlling his own conduct, unless the absence of the power of control has been produced by his own default]."

[THE LORD CHIEF JUSTICE: Yes; but the bracketed parts of the article are stated in a note to be "doubtful."]

In any case, the learned author, as Stephen J., directed the jury in the same sense in *William Davis*, 14 Cox, C. C. 563: 1881. He was followed by Darling J. in *Hay*, 22 Cox, C. C. 268; 75 J. P. 480: 1911. And a similar direction was given by Bray J. in *Fryer*, 24 Cox, C. C. 403: 1915; and, again, in *Jolly*, 83 J. P. 296;: 1919. On this point, in *Victor Jones*, 4 Cr. App. R. 207: 1910, Lord Alverstone C.J. (at p. 217) recognised that the loss of self-control, through mental disease,

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might be a possible ground of excuse; and left the question open for future consideration. It is submitted that, in this case, the question calls for pronouncement.

No complaint is here made of the learned judge's ruling on the law. It is only on the application of the evidence that his direction is called in question.

[The LORD CHIEF JUSTICE: Did the legal argument take place in the hearing of the jury?]

Yes; and it is submitted that such a course was apt to take away the responsibility of the jury, by leaving an impression that their verdict would be dealt with by some higher tribunal. The jury should have been directed that they were bound to accept, and act on, the uncontradicted evidence of the doctors. The whole of our lunacy law is founded on medical opinion. See, *e.g.*, Lunacy Act, 1890, 53 & 54 Vict. c. 5, s. 28, on the requirement of medical certificates to found a reception-order; and see s. 4. The provisions of the Criminal Lunatics Act, 1884, 47 & 48 Vict. c. 64, are also in point. See ss. 2 (3), (4), 3. In conclusion, counsel referred to *Henry Perry*, 14 Cr. App. R. 48: 1919.

Sir Richard D. Muir (with him *Eustace Fulton*) for the Crown.

Hay (above) is inaccurately reported. See Sessions Paper, June, 1911, p. 335, for the evidence of Dr. Dyer.

The meaning of the phrase, "the nature and quality of the act," was fully considered in *Codere*, 12 Cr. App. R. 21: 1916.

McNaughton's Case has never been superseded, or extended. All the cases cited have been reconcilable with it, and, in fact, come within the rules there laid down. Both views having been left to the jury, the verdict cannot now be disturbed.

With regard to the argument that a person "certifiably insane" (in medical opinion) is exempt from criminal penalties, the "judicial authority" under the Lunacy Act, 1890, s. 9, is really the deciding authority, not the medical men.

None of the cases cited really vary the rule in *McNaughton's Case*. In *Quarmby*, 15 Cr. App. R. 163: 1920, it was held that "uncontrollable impulse" was no defence in law. In *Holt*, 15 Cr. App. R. 10: 1920 [and 14 Cr. App. R. 152], Greer J. left

the question of uncontrollable impulse to the jury, and the jury negatived that defence.

[GREER J.: I am not quite accurately reported there. What I really told the jury was that the definition of insanity in criminal cases was the one laid down by the judges in *McNaughton's Case*, but that men's minds were not divided into separate compartments, and that if a man's will power was destroyed by mental disease it might well be that the disease would so affect his mental powers as to destroy his power of knowing what he was doing, or of knowing that it was wrong. "Uncontrollable impulse" in this event would bring the case within the rule laid down in *McNaughton's Case*.]

The rules in *McNaughton's Case* have never been superseded. (He was stopped by the Court.)

Curtis-Bennett, in reply—

The question of uncontrollable impulse has not really been dealt with by the decided cases.

The LORD CHIEF JUSTICE: There can be no doubt on the evidence that the person who committed this ghastly crime was the appellant. The substantial defence which was raised at the Central Criminal Court, and reiterated here, was not that the appellant did not commit the act, but that at the time when he committed it he was, within the meaning of the criminal law, insane. It is true, as his counsel has pointed out, that so far as the appellant is concerned he has always stoutly denied that he committed the act.

On behalf of the appellant, it is said, first, that the verdict which the jury gave was against the weight of the evidence; and in particular under that head of objection it is said that, as certain medical witnesses were called on the part of the defence to say that the appellant was not only insane after the commission of the act but was certifiably insane when he was said to have committed it, and as no medical evidence was called to contradict that view, therefore the jury were bound to accept it.

In the opinion of the Court that contention is not sound. The jury were entitled to say that the facts of the case, taken as a

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whole, apart from any question whether the prosecution called medical evidence upon the special point, satisfied them that at the date of the committing of the act the prisoner was not insane.

But the second and the larger question is whether the learned judge, in the summing-up, stated the evidence sufficiently and properly with reference to the direction which he gave to the jury on the meaning of criminal insanity. It is admitted, as, of course, it was obviously necessary to admit, that the learned judge in this case has allowed, on the question of insanity, a latitude going beyond the rule in *McNaughton's Case*. But it is said that so imperfect is the law that the learned judge did not state, as he should have stated, the evidence for the consideration of the jury.

Now the rule that is founded upon the answers given by the learned judges in *McNaughton's Case* is as follows:—

"The jury ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity it must be clearly proved that at the time of the committing of the act the party accused was labouring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong."

That is a sufficient and salutary rule. In order that the accused person may come within it it must first be shown that at the time of the committing of the act he was labouring under a defect of reason, from disease of the mind. Then there is a choice of alternatives. The word is not "and," but "or." It may be shown that, in consequence of defect of reason due to that disease, the accused did not know the nature and quality of the act he was doing, *or* did not know that he has doing what was wrong.

It is said by counsel for the appellant that this old-established rule has really, as time has gone by, been superseded and developed, and that now there is, and ought to be, a third category—namely, an extension of this kind, that, although the accused may have known what he was doing, and may have known that what he was doing was wrong, nevertheless, if by reason of disease of the mind he was unable to control his action, he is still excused.

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That is to say, the true verdict is that he was guilty of the act charged, but was insane at the time of doing it.

The attention of the Court has been directed to a series of cases:—*William Davis*, 1881; *Victor Jones*, 1910; *Hay*, 1911; *Fryer*, 1915; *Jolly*, 1919; *Holt*, 1920; and *Quarmby*, 1921 [all above]; and the argument was by way of foundation for the submission which counsel was making that if one looked at those cases it appeared that the old rigour of the rule in *McNaughton's Case* had been relaxed.

In the opinion of the Court that proposition is not accurate. It is true—if one looks at certain cases it is apparent—that an extension of the rule has at different times been suggested or indicated; but, curiously enough, when one looks at the facts of the cases relied upon, it appears nowhere that that proposed extension of the rule has been acted upon and approved. There have been moments—there have been at least two in recent years—when the matter might have had to be considered by this Court, but by reason of the finding of the jury the opportunity was taken away.

In the judgment of this Court delivered in 1910 in *Victor Jones*, Lord Alverstone C.J. said, p. 217:—

"There is no need here to enter upon a disquisition on the terms in which the question ought to be left, where a person is prevented by defective mental power or mental disease from knowing the nature of his acts or from controlling his conduct. It is not made out in this case that appellant was not in a condition to be aware of the nature of his act or that he was prevented from exercising self-control. A grave responsibility will lie upon this Court whenever it shall become necessary to decide those large and important questions which have been raised in the argument of appellant's counsel. When that day comes the Court will not shrink from the duty of deciding those matters of controversy and of declaring the law. But in this case they do not arise."

In the present case the learned judge clearly put it to the members of the jury that even if the prisoner knew the physical nature of his act, and knew that it was morally wrong and punishable by law, and yet was from mental disease deprived of the power of controlling his actions at the time, the verdict should be "Guilty, but insane." Nevertheless, the jury, after having that

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extension of the rule laid before them, found that the appellant was guilty of wilful murder. Whatever criticism may be excited by the summing-up, it is not criticism from the point of view of the appellant.

With regard to counsel's contention that the learned judge failed sufficiently to direct the members of the jury upon the evidence on that extended view of the law relating to insanity, in the opinion of the Court that criticism fails. Neither in the conduct of the trial, nor in the summing-up, was there, in the opinion of this Court, anything unsatisfactory from the point of view of the appellant.

It is conceivable that the rule founded upon the answers given by the learned judges in *McNaughton's Case* may on some future occasion be further considered. Much that is excellent is, in practice, further considered and, in the result, confirmed. But no such consideration is required in the present case. It is enough to say that in the view of this Court there is no foundation for the suggestion that the rule derived from *McNaughton's Case* has been in any sense relaxed. Those who seek to rely upon individual passages in this or that summing-up should not omit to observe that, as the law now stands, the prosecution has no appeal to this Court.

In these circumstances and for these reasons the appeal is dismissed. It only remains to add that, apart altogether from any question of appeal, there are certain powers in the Home Secretary which, in a proper case, are always exercised.

Appeal dismissed.

Solicitor for the Appellant—*Freke Palmer.*

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There is "publication" under s. 84 of the Larceny Act, 1916, within the jurisdiction of the Central Criminal Court if a document made or executed anywhere is filed in London.

In a joint indictment each defendant need not be charged in each count thereof.

What charges may be joined in the same indictment is within the discretion of the judge at the trial, subject to the provisions of the Indictments Act.

In appeals on the ground of misdirection, the extent of the misdirection suggested should be carefully stated.

The appellants were convicted, after a twenty-three days' trial, at the Central Criminal Court, on 8th April, 1922, before the Common Serjeant, of conspiracy to defraud and of publishing fraudulent statements in a document in lieu of a prospectus, Hooley also of obtaining money by false pretences, and were sentenced: Hooley to three years' penal servitude, and Wallis to ten months' imprisonment in the second division. Macdonald was bound over. Hooley and Macdonald appealed against their convictions in law, and Hooley asked leave to appeal against sentence, and Wallis against conviction.

The general facts of the case do not call for report.

H. H. Joy, for Hooley, who was not present. It is submitted that there was no jurisdiction in the Central Criminal Court to deal with the indictment, from Count 6 to the end. Sect. 39 (1) of the Larceny Act, 1916, 6 & 7 Geo. V. c. 50 (*a*), means no more than it says. It does not follow that an accused person may be tried wherever he happens to be in custody, irrespectively of the place of commission of the alleged offence. See Archbold, 25th ed., p. 28.

The form of the indictment contributed to the difficulties of appellant's having a proper trial. The whole atmosphere was adverse to Hooley.

The learned Common Serjeant's summing-up, occupying twelve

(*a*) "A person charged with any offence against this Act may be proceeded against, indicted, tried and punished in any county or place in which he was apprehended or is in custody as if the offence had been committed in that county or place . . ."

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and a half hours, contained misdirection in several points. In particular, he repeatedly referred to Hooley as the "boss" in the alleged fraudulent negotiations. And, in conclusion, he told the jury: "But these commercial frauds must stop."

[The LORD CHIEF JUSTICE: What is wrong with that? "But" seems to imply that, with reference to the particular case, the learned Common Serjeant has put something in a contrary sense before.]

Yes, that "but" is the worst part of it. A judge first tells a jury in common form that they are not to convict anybody without clear evidence, and then, with emphasis, that somebody must be convicted. It is prejudging the question for the jury. Compare the language of Cockburn C.J. in *Gurney*, 11 Cox, C. C. 468: 1869: "You have been told that your verdict is to effect great things—that the commercial world requires to be purified and regenerated, and that your verdict is to effect this important end. Do not be influenced by any such consideration." That is how a jury should be directed in a case of this kind. The learned Common Serjeant's utterance was a most improper and unfortunate one.

Hooley was neither a director, nor an officer, of the company. Counsel proceeded to read, at great length, passages from the summing-up of which he complained. In conclusion, he submitted that there was no evidence sufficient to support the conviction for conspiracy, and that the sentence of penal servitude was therefore excessive.

(*Serjeant*) *A. M. Sullivan, K.C.* (with him *T. N. Winning* and *H. H. Maddocks*), for Macdonald, who was not in custody.

Objection to the indictment was taken at the trial on the ground that no "particulars of the offence" of conspiracy were given. The indictment was amended, but it was not alleged by the amendment, or otherwise on the face of the document, that the "particulars" were the other counts. The indictment charges all defendants with one offence, and different groups of some of the defendants with other offences. Application was made at the trial that offences with which Macdonald was not charged should be tried separately. This was refused. Joinder depends on the

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Indictments Act, 1915, 5 & 6 Geo. V. S. 3 (1) mentions "*the* accused person" repeated in Rule 7. S. 4 must mean joinder of charges against identical individuals, it gives "*the* person accused" (*b*) a right of challenge. S. 5 (3) refers to "*a* person accused . . . being charged with more than one offence" (*c*). The Interpretation Act, 52 & 53 Vict. c. 63, s. 1 (1) (*b*), authorises substitution of the plural number, converting the phrase into "persons accused," but it does not authorise insertion of the phrase "or any of them." Rule 3 (*d*) cannot enlarge the provisions of s. 4, otherwise all the burglars at one Sessions can be tried together, each for his own offence, all the burglaries constituting "a series of offences of the same or similar character." See *per* Palles C.B. in *O'Keeffe* v. *Walsh*, 1903, 2 Ir. R. 689.

[The LORD CHIEF JUSTICE: Do you say that several persons ought not to be tried together on one indictment unless each one is referred to in each count of the indictment?]

I do. As regards the conviction for "making" or "publishing," there was no jurisdiction in the Central Criminal Court to try the charges under s. 84 of the Larceny Act, 1861, 24 & 25 Vict. c. 96 (*e*). No offence had been shown in the County of

(*b*) S. 4: "Subject to the provisions of the rules under this Act, charges for more than one felony or for more than one misdemeanour, and charges for both felonies and misdemeanours, may be joined in the same indictment, but where a felony is tried together with any misdemeanour, the jury shall be sworn, and the person accused shall have the same right of challenging jurors as if all the offences charged in the indictment were felonies."

(*c*) S. 5 (3): "Where, before trial or at any stage of a trial, the Court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in an indictment, the Court may order a separate trial of any count or counts of such indictment."

(*d*) Rule 3: "Charges for any offences, whether felonies or misdemeanours, may be joined in the same indictment if those charges are founded on the same facts, or form or are part of a series of offences of the same or a similar character."

(*e*) S. 84: "Whosoever, being a director, manager or public officer of any body corporate or public company, shall make, circulate, or publish, or concur in making, circulating, or publishing, any written statement or

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London. The offence, if any, was completed when the agreement of 6th January, 1920, was signed, and that was done at Derby. The subsequent filing at Somerset House was not a "making and publishing" as charged.

Macdonald had no actual knowledge at the time of the contents of the statement in lieu of prospectus. He signed what was put before him by the solicitor to the company. Compare *East Cork Election Petition*, 6 O'Malley & Hardcastle, 1911, at 360.

H. D. Roome, for Wallis, who was present.

The facts proved were more consistent with appellant's innocence than with his guilt. There was misdirection in several respects. Wallis's case was confused with that of the other defendants. He was merely solicitor to the company, his managing clerk, Lowis, being secretary.

There was no adequate direction to the jury that evidence against the defendant by co-defendants whom the jury find to be guilty cannot be accepted without corroboration. The learned Common Serjeant slurred over everything that told against Fletcher, the Managing Director, who was acquitted. The suppression of Hooley's name from the agreement of January 6th, 1920, was immaterial.

[GREER J.: I doubt that.]

There was no necessary intention to defraud established against Wallis.

[The LORD CHIEF JUSTICE: All this is perilously like an address to a jury. Did you not urge these topics at the trial?]

Sir Richard D. Muir (with him *Roland Oliver*) for the Crown, was called upon only on the questions of jurisdiction and the form of the indictment.

account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanour."

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Under the Larceny Act, 1916, s. 39 [above], the former rules in larceny cases do not apply to false pretences. A person charged may be tried in any county or place in which he is apprehended, or is in custody. [He was stopped by the Court on this point.]

With regard to the contention on behalf of Macdonald on the Indictments Act, 1915: Before the Act, it was the practice to include various misdemeanours in one indictment. The Act limits the offences to those of one class: s. 4, as interpreted by Rule 3, *i.e.*, "charges founded on the same facts," &c. This covers the present case. Before the Act, there had to be election of felonies. The law was considered in *Grizzard, Lockett and Others*, 1914, 2 K. B. 720; 83 L. J. K. B. 1193; 110 L. T. Rep. 398; 78 J. P. 196; 9 Cr. App. R. 268.

When there is no misjoinder, the matter is in the discretion of the judge.

On the question of venue: s. 84 of the Larceny Act, 1861 [above], was passed for the protection of the public. The Companies (Consolidation) Act, 1908, 8 Edw. VII. c. 69, s. 243, provides that "Any person may inspect the documents kept by the Registrar [of Companies]," *i.e.*, at Somerset House. There was clearly publication in the County of London. [He was stopped by the Court.]

Sullivan, K.C., in reply.

The words "make or publish" in s. 84 must bear the same meaning as in the case of wills and libels. Macdonald was not charged with "concurring."

The LORD CHIEF JUSTICE: Th hree appellants were convicted after a trial lasting twenty-three days. Another prisoner, Demery, was convicted with them, but he did not appeal; and two others, Fletcher and Breakspear, were acquitted. Hooley appeals against conviction on the ground, among other things, that the Court had no jurisdiction to try any of the charges except the charge of conspiracy, and he alleges misdirection. Wallis appeals against conviction and says that the evidence was more consistent with his innocence than with his guilt. Macdonald appeals against conviction on the ground that the inclusion in one indictment of charges against him, and independent charges against other prisoners, is not justified in law, that there was

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no jurisdiction to try him under s. 84 of the Larceny Act, 1861, and that on the conspiracy charge there was misdirection of the jury.

In the first place, it is necessary to repeat an observation which this Court thought it right to make recently on another notice of appeal. In the present notice of appeal it is alleged that the learned judge "so misdirected the jury that the real issues were not before them, and he entirely failed to direct the jury upon the defence put forward on behalf of the defendants." As I said a few days ago, when learned counsel are drafting a notice of appeal to this Court, they are not drafting a defence to a statement of claim, and they are not justified in saying "or at all" unless they seriously mean it. Does the learned counsel really mean that the learned judge "entirely failed to direct the jury upon the defence put forward"? What has been urged upon the Court is that he had not sufficeintly or properly directed the jury. In the elaborate summing-up, which took more than twelve hours to deliver, all the industry, ingenuity, and care of Hooley's counsel have succeeded in discovering only a series of trivial points which called for nothing more than casual criticism. So far as the complaint directed against the summing-up is concerned, there is not, on the part of Hooley or either of the other two appellants, any ground for the unfavourable observations which have been made. The learned Common Serjeant was dealing with a case of unusual complexity and length. He began by explaining the law of conspiracy, and after he had examined the main issues in the case he dealt *seriatim* with the particular case of each one of the accused persons. It is not for this Court to comment upon the merits of a summing-up, but it may well be said that this was a remarkable performance.

The argument on behalf of Hooley began with the complaint that there was no jurisdiction to try him upon count six or any one of the remaining counts to the end of the indictment. That argument depended on the view put forward of the true construction of the pertinent section of the Larceny Act, 1916. In the opinion of this Court there is nothing in that objection. So far as Hooley is concerned there does not appear to be any ground for interfering with the sentence which has been passed, and his appeal is dismissed.

With regard to Macdonald, his counsel has urged mainly two

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points—that the indictment contained insufficient particulars, and included charges against persons with whom Macdonald had no connection at all. These two points are closely connected with each other. In the opinion of the Court, the argument depended on a misconstruction of certain sections in the Indictments Act of 1915. The substance of the complaint here is that this indictment, which began with the general charge of conspiracy and proceeded to charges under s. 84 of the Larceny Act, 1861, went on to contain, and to conclude with, a series of charges of obtaining money and valuable securities by false pretences, and to charge against some but not all of the accused persons the actual committing of the acts which, it was said in the first count, it was the object of the conspiracy to commit. It is said that the law does not permit charges against some only of the accused to be contained in an indictment comprising all the accused persons. In the opinion of the Court that submission fails, for it tends to narrow the meaning of the words of the section. The argument was based on the alleged oppressiveness which might otherwise be permitted by the law, but, as Sir Richard Muir has pointed out, there are three correctives—the good sense of counsel, the discretion of the judge, and the phrasing of Rule 3 itself. With regard to the facts, it is not necessary that they should be reviewed. In order to succeed in that part of his appeal Macdonald would have to satisfy the Court that in the events which took place there was no evidence on which the jury could reasonably convict him. In the opinion of this Court there was not merely sufficient but ample evidence for that conviction, and when one looks at the sentence which the learned judge thought it right to pass upon Macdonald—namely, that he was bound over to come up for judgment if called upon—it is not possible to resist the view that he (the Common Serjeant) thought that Macdonald was to a great extent the instrument of another. It does not need much ingenuity to perceive from the evidence who that other might be thought to be.

A further point of law has been taken by Serjeant Sullivan on s. 84 of the Larceny Act, 1861. The point is that there was no jurisdiction to try the counts relating to the documents, as what was done was not done in London. But it is obvious from the evidence that Macdonald, when he took the part he did, well knew that the documents were destined for Somerset House. The words

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in the section are "make, circulate, *or* publish," and one of those acts is sufficient. There was evidence to bring Macdonald within the jurisdiction of the Central Criminal Court.

With regard to Wallis, the points sought to be made were, first, that the verdict could not be supported on the evidence; and, secondly, that in the summing-up the individual case of Wallis was, in vital respects, confused with the cases of the other defendants. So far as the facts are concerned it is not for this Court to perform the functions of a jury. There was ample evidence before the jury to justify their verdict; and with regard to the summing-up, although it may well be that, on looking through the 206 pages of transcript, small points may be found which might have been more fully expressed, yet, taking the summing-up as a whole, the Court is of opinion that it was adequate and right.

In these circumstances, the appeals both of Macdonald and Wallis are dismissed, and the Court sees no ground for interfering with the sentence passed on Wallis.

Appeals dismissed.

With regard to Wallis, whose appeal might have been heard on May 22nd, the Court ordered that his sentence should run as though the appeal had been heard on that date.

Solicitors for Hooley—*Hamlins, Grammer & Co.* for *Bendle Moore,* Derby.

Solicitors for Macdonald—*Pattinson and Brewer* for *Flint, Marsden and Bishop,* Derby.

Solicitors for Wallis—*Townsend and Sharpe* for *Huntsman and Donaldson,* Nottingham.

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Acquiescence in a request may create a trust within s. 20, *sub-s.* (1) (*iv*) (*a*) *of the Larceny Act*, 1916.

Appellant was convicted at the Central Criminal Court, on April 7th, 1922, after a nine days' trial, before Mr. Justice Roche, of the fraudulent conversion of Government money, and sentenced to eighteen months' imprisonment in the second division. He appealed on points of law.

Charles, K.C. (with him *Eustace Fulton*), for the appellant, who was present. At the trial I appeared not for this appellant, but for Mr. Nevanas, another director of the Nevanas Company, Ltd., who was acquitted. The two short points here are:—(1) was appellant in fact entrusted with Government monies within s. 20 (1) (iv) of the Larceny Act, 1916 (*a*)? (2) if there was a trust, was not the company and not the appellant the trustee? Now this was merely a commercial transaction—not a trust: the company sold the meat for the Government, but did not keep a separate account of such sales; the proceeds were mixed with their own till the Government wrote requesting them to keep a separate account, which they did as an act of accommodation. But they did not cease to be merely "*del credere*" agents; the Government looked to the firm for their money, not to any one account. A mere request could not vary the contract. Mere acquiescence is not an acceptance of the fiduciary position alleged by the Crown.

Such a question ought not to have been left to the jury: it is a question of law.

Then a director is not a trustee for the creditors of a company,

(*a*) Which runs: "Every person who (a) being entrusted either solely or jointly with any other person with any property in order that he may retain in safe custody or apply, pay or deliver, for any purpose or to any person the property or any part thereof or any proceeds thereof; or (b) having either solely or jointly with any other person received any property for or on account of any other person, fraudulently converts to his own use or benefit or the use or benefit of any other person the property or any part thereof or any proceeds thereof shall be guilty of a misdemeanour . . ."

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1, 2 *June.*

WILLIAM HENRY CUFFIN.

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Acton J.

but for the company. This was a vital point, yet there was no direction on it by the learned judge.

R. Oliver (with him *Travers Humphreys*) for the Crown. On the first point, the only question is whether the money was received "for and on account of" the Government: *Scranton*, 15 Cr. App. R. 104: 1920. The Government were entitled to and did change the conditions: "either you pay proceeds direct to us for the future or you lose the contract."

On the second point *Grubb*, 1915, 2 K. B. 683; 84 L. J. K. B. 1744; 79 J. P. 430; 113 L. T. 510; 59 S. J. 547; 31 T. L. R. 429; 11 Cr. App. R. 153, is conclusive. Appellant had control of the money, and the intervention of a limited company cannot affect his personal liability. See also the definition of "property" in s. 46 of the Larceny Act, 1916, including anything "under the control of any person." Appellant admitted that the money was deposited as he decided. In the circumstances no special direction on the point was necessary.

The Court held that this case was within *Scrutton's Case*. In the course of business it became an essential condition of the contract that there should be a separate banking account and monies kept distinct, and this condition the company accepted. The learned judge was right in refusing to withdraw the case from the jury: it was for them to decide what at any stage was the relationship between the parties. The jury, too, were entitled to decide whether the trust was to the company or to the appellant: *Grubb's Case* is conclusive on this point.

Appeal dismissed.

Solicitors for Appellant—*S. Myers & Son.*

H. C.

CHARLES HARDCASTLE LEE.

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Hewart L.C.J.
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Severity of sentence.

Leave to appeal against sentence was granted by the Court on May 22nd. Appellant was convicted, at the Leeds City Sessions, on April 12th, 1922, of larceny, and was sentenced by the Assistant Recorder to three years' penal servitude.

Appellant in person.

The LORD CHIEF JUSTICE: It is not right to reduce sentences without some clear and substantial reason. There have been many previous convictions of this man, but he has not been convicted of any serious offence for a considerable number of years. In the circumstances, the Court thinks that a sentence of twelve months' imprisonment with hard labour will suffice, and hopes that its clemency will not be thrown away. Sentence may run from the date of conviction.

Sentence reduced.

H. C.

ISAAC YULES.

Severity of sentence.

Appellant, who appealed by leave of the Court granted on May 22nd, was convicted, on April 13th, 1922, of shopbreaking, at the Leeds City Sessions, and sentenced, by the Assistant Recorder, to three years' penal servitude.

Appellant in person.

The facts were on all-fours with *C. H. Lee's Case* (above), and the Court, repeating its remarks, took the same course.

Sentence reduced.

H. C.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE BRAY AND LORD COLERIDGE J.

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JAMES VINCENT HOGAN.

New counts for charges on which there has not been a committal for trial may be added to an indictment without the leave of the Court of trial if those charges be founded on the eviden e disclosed in the depositions, subject to such counts being disallowed by the Court at the trial. Clarke, 59 *J. P.* 248: 1895, *approved.*

If on the submission by one defendant that there is no case to go to the jury, the Court holds that there was a case, it will not interfere if the judge uses the subsequent evidence of defendants against that defendant. Power, 14 *Cr. App. R.* 17: 1919, *explained.*

Appellant was convicted, with two other defendants, on May 20th, after a six days' trial at Manchester Assizes, before Branson J., of fraudulent conversion of funds and of conspiracy to defraud. and was sentenced to three years' penal servitude and twelve months' imprisonment (concurrent). He appealed on various points of law.

F. W. Roe Rycroft for appellant (under s. 10 of the Criminal Appeal Act), who was present. (1) After arraignment, I objected to certain counts extending the dates of the alleged conspiracy which had been added to the indictment, on the ground that no leave had been obtained to add these counts with new charges—contrary to the Vexatious Indictments Act, 22 & 23 Vict. c. 17, s. 1, as amended by the Criminal Law Amendment Act, 1867, 30 & 31 Vict. c. 35, s. 1 (*a*). The prosecution cited *Clarke and Lyons*, 59 J. P. 248: 1895, but there Collins J. in substance gave consent at the trial; here Branson J. simply overruled my objec-

(*a*) S. 1 of 22 & 23 Vict. c. 17, is not to "extend" or to "be applicable to prevent the presentment to or finding by a grand jury of any Bill of Indictment containing a count or counts for any of the offences mentioned in" that "Act if such count or counts be such as may . . . be lawfully joined with the rest, . . . and if the same count . . . be founded (in the opinion of the Court in or before which the same Bill . . . be preferred) upon the Facts or Evidence disclosed in . . . Depositions. . . ."

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JAMES VINCENT HOGAN.

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tion, his consent was neither granted nor refused. The name of the first witness called to support the alleged conspiracies was not endorsed on the indictment. The Indictments Act, 1915, s. 7, preserves this defendant's rights. (2) At the end of the case for the prosecution I submitted that there was no case against this appellant, and declined to take any further part in the proceedings. Nevertheless, the learned judge, in his summing-up, used against this appellant the evidence for the defence, including that of the two other defendants: this is contrary to the ruling in *Power*, 1919, 1 K. B. 572; 88 L. J. K. B. 593; 83 J. P. 124; 120 L. T. 577; 35 T. L. R. 283; 14 Cr. App. R. 17 (five judges), where a conviction was quashed (though not on the ground that after counsel had unsuccessfully submitted that there was no case against defendant subsequent evidence had admittedly produced matter for the jury), where Darling J., giving the judgment of the Court, said: "To have been quite safe he [counsel for defendant] should have taken no part in the subsequent proceedings"—he in fact having called his client and cross-examined a witness. Here neither I nor defendant took any part after my submission.

Singleton, K.C. (with him *J. C. Jackson*) for the respondents, was only called upon on the first point. *Clarke's* case is conclusive; the new counts were founded on "facts or evidence disclosed in depositions" duly taken, and no leave to add them was required.

DARLING J.: The new counts were properly added: no leave was necessary, that is shown by *Clarke's* case.

I did not say that whenever a defendant submitted that there was no case and took no further part in the trial the judge must withdraw the case from the jury. If such a submission is good when taken, it cannot be made bad by the subsequent evidence of defendants. But here there was a case at the close of the prosecution. If a judge may not call attention to such evidence when it is against the defendant, he may not when it is in his favour, which would be a great injustice. Moreover, this appellant did not go into the witness-box.

Appeal dismissed.

Solicitor for the Respondents—*The Town Clerk of Manchester.*

H. C.

BEFORE

MR. JUSTICE BRAY, LORD COLERIDGE J., AND MR. JUSTICE ROCHE.

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HORATIO BOTTOMLEY.

It is immaterial from whom "property" is received, within the meaning of s. 20 (1) (iv) (b) of 6 & 7 Geo. 5, c. 50, the Larceny Act, 1916.
It is not a mistrial if a duly qualified person serves on a jury under a misnomer (unless, semble, he would have been successfully challenged).
Severity of sentence.

Appellant was convicted at the Central Criminal Court, on May 29th, 1922, after an eight days' trial, before Salter J., of fraudulent conversion of moneys "received for and on account of the subscribers to and members of" certain clubs, under s. 20 (1) (iv) (*b*) of the Larceny Act (above, p. 179), on an indictment containing twenty-three counts, on all of which, except one withdrawn by the prosecution, he was found guilty, and was sentenced to seven years' penal servitude.

The appeal was against conviction on points of law, and against sentence. At the trial appellant was not represented by counsel.

Disturnal, K.C. (with him *G. W. H. Jones, R. Oliver* and *Sir Harold Smith*), for the appellant, who was present (and was allowed to sit at the solicitors' table).

In view of the fulness of the judgment, the arguments of counsel are only summarised here.

Counsel read the whole of the learned judge's summing-up in support of his contention that there was serious misdirection. Especially he complained that dealing with appellant's evidence (at the trial), that the sums which he was charged with stealing, and which did not appear in any account, were repayments to himself for advances which he had made to the funds in question, the judge had repeatedly told the jury that there was no corrobora-

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tion of this story, whereas it was proved by the prosecution as regards £23,000, and other sums amounting to £90,000, that appellant had paid to the fund out of his own moneys. It is submitted that the proper direction would have been, "if defendant gives a reasonable explanation, then if the jury accepts it, or has a doubt about it, there ought to be an acquittal: it was for the prosecution to prove the intent to defraud." Here the jury were distinctly led to believe that the *onus* of proving innocence and of the reasonableness of the explanation was on the defendant.

[BRAY J.: Apply that principle to the defence of *alibi*.]

I do. The judge further said that there is no rule that a jury must believe what is deposed on oath and is not cross-examined to —as was the case here—and repeated, "There is no evidence but defendant's bare statement that he paid £150,000 out of his own resources. . . . There is no corroboration of a shilling being so paid;" the learned judge, in fact, forgot the corroboration there was.

[LORD COLERIDGE J.: That does not show that the jury forgot it.]

With regard to the most damning document of all, a circular stating "there are still £500,000 worth of Victory bonds in existence" (when there was nothing like that amount), it was not issued with defendant's knowledge or authority; there was no evidence that he had anything personally to do with it—indeed, for this reason, it could not be put in at the trial as an exhibit, though it was mentioned in the opening of counsel for the Crown, and was never proved—yet the learned judge throughout assumed that defendant was responsible for it—always putting the *onus* on him. Defendant said: "I have paid back what I took; in fact, I am a creditor of the fund." All the jury had to decide was whether this explanation was reasonable or not, *not* whether it was true or false. On *onus*, counsel cited *Stoddart*, 2 Cr. App. R. 241: 1909; *Saunders*, 14 Cr. App. R. 11: 1919; and *Albert Lewis*, *ibid.* 33.

Next, the indictment was misconceived; possibly there was an offence under s. 20 (1) (iv) (*a*) (set out p. 179 above), but there

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was no charge thereunder. No doubt the money received from the members was within the "property" section 46, but here the learned judge assumed that the money was received "for and on account of" the members. Now s. 17, the embezzlement section, deals with clerks and servants who steal (a) anything "belonging to or in the possession or power of" the "master or employer," or (b) anything "delivered, or received, or taken into possession by him for or in the name, or on the account of" the "master or employer," and this has never been held to found a charge for things received *from* the master, and so the words "for or on the account of" should be interpreted in s. 20 (1) (iv) (*b*).

[ROCHE J.: Were not the bonds received from the issuers, the Government, "for and on account of" the subscribers?]

Of that there was no evidence; they were bearer bonds.

[ROCHE J.: Could it not be proved *aliunde?*]

The bonds were not received from the Government for or on account of anyone.

[BRAY J.: Then "for" whom were they received?]

For defendant himself. They were not earmarked; there was no mandate from anyone how the bonds were to be used. You must look at the money subscribed and then trace it, and if you find that any of it was received on certain trusts no doubt you might use sub-s. (iv) (*a*), but then you must charge that sub-section; here you could not find an offence under (*a*) on an indictment under (*b*).

[BRAY J.: Was not the defendant an agent for the clubs?]

Perhaps. Here there was no bailment, and so no larceny by a trustee. In fact, these sub-sections were intended for a different category of crime, viz., where there was a trust to anyone for a *specific* purpose. Even if the bonds had been registered they would have been registered in the defendant's name. No indi-

vidual subscriber had any interest whatever in any individual bond, the property in every one was in the defendant.

[BRAY J.: Was this point taken below?]

No, and if it had been there would not have been an amendment.

[BRAY J.: What authority have you on the point that the property was not received *from* the subscribers?]

There is no direct authority, but see *Eliz. Smith*, R. & R. 267: 1814; *Hawkins*, 4 Cox, C. C. 224; 1 Den. C. C. 584; T. & M. 328; 14 Jur. 513: 1850; C. C. R. 69. [And *Grubb*, 1915, 2 K. B. 683; 84 L. J. K. B. 1744; 25 Cox, C. C. 77; 79 J. P. 430; 31 T. L. R. 439; 11 Cr. App. R. 153, *per* Roche J.] In *Grubb* there was a conviction both under (*a*) and (*b*).

Again, there was, it is submitted, a mistrial, because a juror whose real name was Robert *Symons* was summoned, sworn, and sat under the name of Robert *Parsons;* if necessary, leave will be asked to call evidence of the fact.

[The Court stated that it did not wish to hear evidence on the point.]

Thus defendant lost his constitutional right of challenge, a right carefully safeguarded by law, *e.g.*, in some statutes: The Juries Act, 1825, s. 1, and s. 45, and cf. Registration of Business Names Act, 1916, and The Aliens Restriction (Amendment) Act, 1919. The leading case is *Mellor*, D. & B. C. C. 468; 7 Cox, C. C. 454; 27 L. J. M. C. 121; 4 Jur. N. S. 214: 1858.

[LORD COLERIDGE J.: See *Wakefield*, 1918, 1 K. B. 216; 62 S. J. 309; 87 L. J. K. B. 319; 82 J. P. 136; 34 T. L. R. 210; 118 L. T. 576; 13 Cr. App. R. 56.]

[BRAY J.: And note to *Hill* v. *Yates*, 12 East, 231: 1810, of a case in 1783 (*a*).]

(*a*) "The Case of a Juryman," where the headnote is: "Where R. C. answered to the name of J. C. on the sheriff's panel, at the trial of a prisoner

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This misnomer makes a mistrial.

The sentence, the maximum term, was in the circumstances excessive.

Travers Humphreys (with him *Roome*), for the Crown, was called upon only with regard to the point on the statute.

Appellant had described himself as a "managing trustee." This is the converse of *Grubb's* case. S. 17 does not assist us to find the meaning of s. 20 of the Larceny Act. Sub-s. (1) (iv) (*b*) is intended to cover all cases of fraudulent misappropriation which do not come within iv (*a*), irrespectively of the person from whom the property is received. After an early date in 1920 some of the money cannot be traced because subscribers were asked to send it to Paris.

Disturnal, K.C., in reply.

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The judgment of the Court was read by Bray J., who summarised the facts proved and continued:

The grounds of appeal were: (1) Misdirection of the learned judge in his summing-up. (2) That the offences of which the jury found the appellant guilty were not covered by the indictment. (3) That there had been a mistake owing to the jury not having been properly constituted. It will be convenient to deal with the points 2 and 3 first.

As to point 2, all the counts of the indictment charged the appellant with fraudulent conversions of monies and property within the words of s. 20, sub-s. (1) (iv) (*b*) of the Larceny Act, 1916, and the contention was that none of the conversions of which he was convicted were within that sub-section, because the monies and property alleged to have been received by the appellant for and on behalf of the subscribers were received from the subscribers

for a capital felony, it is mere matter of challenge, and after verdict cannot be taken advantage of by the party convicted, as a mistrial."

The headnote to *Hill* v. *Yates* is: "The son of a juryman summoned and returned having answered to his father's name when called on the panel, and served as one of the jury on the trial of a cause, is not of itself a sufficient ground for setting aside the verdict as for a mistrial."

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themselves. The argument was that the decisions showed that a man cannot be convicted of embezzlement if he misappropriates money or property received from his master, and that the sub-section must be construed in the same way as excluding such cases, because the language used is the same as in s. 17 of the same Act which deals with embezzlement. We were referred to the cases of *Rex* v. *Smith*, R. & R. 267, and *Reg.* v. *Hawkins*, 4 Cox, C. C. 224. The latter case decided that the receipt was not a receipt under circumstances which made the appropriation of the goods embezzlement—it was larceny. Now sub-s. (1) (iv) (*b*) of s. 20 of the Act was a re-enactment of a similar sub-section of the Act of 1901. It was the creation of a new offence. It is not dealing with embezzlement, but with some different offence. Embezzlement is dealt with by s. 17. It cannot be inferred because some of the language of the sub-section of s. 20 is the same as that in s. 17 that cases decided with reference to s. 17 apply to the words of this sub-section. We must look at the actual words used in this sub-section and give them their natural interpretation. The words are: "having either solely or jointly with any other person received any property for or on account of any other person." It does not say from whom. The section treats that as immaterial. If he has received property for and on account of any other person for any other person than himself, he commits an offence if he fraudulently converts that to his own use or benefit. That seems to us to be the natural interpretation of the words of the sub-section, and we can see no reason why we should put any limited construction on these words. This interpretation of the sub-section is the same as was adopted by this Court in the case *Rex* v. *Grubb*, 1915, 2 K. B. 683 at p. 689 [above]. That being so, we are of opinion that so far as the appellant received these monies and fraudulently converted them, he committed an offence within the words of the sub-section, and therefore within the indictment. Some of the counts of the indictment charge him with having converted something other than money, *i.e.*, 5 per cent. National War Bonds (counts 1 and 2), and Victory Bonds (or the allotment letters, which are the same thing) (count 3). Now these he received from the Bank of England. With regard to these it was contended he received them for himself because they were payable to bearer. But he received the monies with which he bought them for the subscribers, not for himself, and when he bought these bonds

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he held them for the subscribers in the same way. It cannot make any difference whether these bonds would pass by hand to bearer or by transfer. In either case as between him and the subscribers he held them for or on account of the subscribers. This point therefore fails.

Now with regard to point 3. We did not require the witnesses to be called because we accepted the facts stated in the notice of appeal to be correct. It was argued that there was a mistrial because the appellant was, by reason of this misnomer, deprived of his right to challenge the juror in question. It was not suggested that the appellant would, but for this misnomer, have challenged and successfully challenged this juror. If that had been the case a different question would have arisen, on which we do not desire to express any opinion. The facts of this case showed the man Symonds was qualified to be on the list of jurors, that he was the man intended to be summoned, and the man intended to be called into the box and sworn as a juror. It appears to the Court that the case called "The Case of a Juryman," reported in a note to *Hill* v. *Yates*, 12 East, p. 231, covers this case. In that case the facts were practically identical with the present, and the judges were unanimously of opinion that this misnomer was no ground of objection even if a writ of error were brought, much less on a summary application. That case was referred to by several of the judges in their judgments in *Mellor's Case*, 7 Cox, C. C. p. 454. None of the fourteen learned judges suggested that that case was wrongly decided, or dissented from it in any way. The last case dealing with this point was *Wakefield*, 13 Cr. App. R. p. 56. There a man named Tooley on the jury list was summoned, and he sent a substitute named Clarke, who answered when Tooley's name was called, and was sworn as one of the jury who tried the case. Clarke was not qualified to sit on the jury at the trial. The Court decided on an appeal that this was a mistrial, and ordered a new trial. In that case the Court took time to consider, and Darling J. read the judgment of the Court. In it he said: "Many cases have decided that mere irregularity in calling together the jury, mere misnomer of a juryman, is not sufficient to avoid the proceedings." It is true that this was only a dictum, but it was a dictum of the whole Court, and in our opinion it states the law correctly. This point therefore fails.

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Now with regard to the alleged misdirection. Particulars of the misdirections complained of are given in the notice of appeal. The main complaint made by counsel for the appellant was that the learned judge, in dealing with the evidence for the defence set up by the appellant, directed the jury that it was for the appellant to establish certain facts alleged by him.

The learned judge dealt *seriatim* with the impugned passages in the summing-up, and continued:

It is, we think, the case that the learned judge in his summing-up did use words which might be construed as telling them [the jury] that the *onus* of proving the truth of this allegation of the appellant [that the fund was in debt to him] lay on him. It was argued that the words used by the learned judge amounted to a statement that the *onus* of proof had changed. Of course, we must look at the whole summing-up to see if this is so. He never during the whole of his summing-up suggests that the *onus* of proving that the prisoner fraudulently converted these sums to his own use had changed. We have therefore to consider whether, assuming it to have been given, it was wrong to give a direction that the *onus* was upon the defendant to prove the fact which he alleged, viz., that whenever a payment was made out of the account of the club for his benefit or on his behalf the money was due to him.

In our opinion this direction was right. The prosecution had given evidence that in a large number of cases the appellant had drawn out the monies of the club and had used them for himself—he had put them in his own pocket. He had used them for discharging his own debts, for purchasing newspapers, and helping his relations. This was evidence which, if true, would have justified the jury in finding that he had fraudulently converted these monies to his own use and benefit. The jury were not bound to so find, but they might so find if they were satisfied of the fraud. The *onus* did not shift. It still remained for the prosecution to satisfy the jury that the conversions were fraudulent. The appellant desired to meet these facts by proving other facts, viz., that at these times the club owed him the monies which he withdrew. It seems to us that in such a case as this it was for the appellant to prove these facts just in the same way as where the question of the identity of the defendant arises, and the defendant sets up an *alibi*, the *onus* of proving the *alibi* rests on

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the defendant. The *onus* on the prosecution of proving the identity still remains. It does not prevent the jury from finding that, notwithstanding the *alibi* is not proved, the evidence given on the defendant's behalf throws so much doubt on the evidence of the prosecution as to lead them to say we have a doubt about the guilt of the prisoner and acquit him. It is the same in a case of murder, it is for the defence to establish provocation, or in the case of wounding or assault it is for the prisoner to prove self-defence.

It was then put in another way: that the learned judge should have told the jury that even if the appellant had failed to satisfy them that the clubs did owe him these monies, yet if the whole of the evidence, including the evidence about the monies being due, led them to doubt whether the conversion was fraudulent they ought to acquit the appellant.

Whether this can be held to be a non-direction which constitutes a misdirection must depend upon the whole circumstances of the case and the contentions raised. There had been at the beginning of the summing-up a full and clear direction on the *onus* of proof. There was nothing said by the learned judge in the course of the rest of his summing-up to qualify this in any way. We cannot find in the evidence of the appellant, or in either of his speeches, any such contention as is suggested by counsel. His case was—I will prove or have proved that monies were owing to me by the clubs whenever I withdrew money from their account. That was the particular issue with which the learned judge had to deal when he was dealing with the facts. He was not dealing with the wider question whether he was guilty or not. If any more qualified contention had been set up it might have been the duty of the judge to direct the jury upon the point, but a judge cannot be expected to direct a jury upon all possible points which an ingenious counsel may suggest. Further than that, when the evidence adduced by the appellant on this issue is examined, it falls so utterly short of satisfactory proof that it could not have raised a doubt in the minds of a reasonably minded jury. We hold that there was no non-direction or misdirection.

The learned counsel also complained of certain alleged mis-statements of the evidence by the learned judge in the course of his summing-up. We do not accept the view that there were such mis-statements. There was no real corroboration of the appellant's evidence by documents or otherwise. It was quite

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clear that he had failed to keep anything like a proper account. It would have been the simplest thing to enter in books on the one side the amounts received from subscribers, and on the other the amount of any payments by the appellant out of his pocket for expenses, or for repayment to subscribers, or of any other sums with which he was entitled to debit the clubs. He said he had to employ a large number of clerks. He did not suggest that he had instructed any of those clerks to make, or attempt to make, any such entries. He had promised the subscribers that there should be trustees and auditors. None such were appointed. His whole conduct was calculated to lead one to suspect that the mixing up and muddling of such accounts as existed was intentional. We have come to the conclusion that the case for the prosecution was overwhelming, and that no other verdict than that of guilty could reasonably have been given. The appeal against conviction therefore fails on all points.

The appellant also appeals against sentence. Ordinarily, before this Court allows an appeal from sentence, it has to be satisfied that the judge has not had all the facts before him, or has not given them full consideration, or that the sentence is so excessive as to show that his discretion was not properly exercised. There is no suggestion here that the learned judge had not all the facts before him, or had not given them full consideration. It must be shown then that the sentence is so excessive as to show that his discretion was not properly exercised.

Now it is true that the defendant has never been convicted before, and that the sentence is the maximum sentence, but here the defendant has been convicted of twenty-three different offences, extending over a period of about two years, and the total amount of money and property converted was over £150,000. The sentence of seven years' penal servitude is the maximum sentence for one offence. It is not usual to give a separate sentence for each offence and make the sentences consecutive, which would make the term of penal servitude exceed the maximum, but the judge always takes into consideration the number and the gravity of the offences committed. He has done so here. It was very strongly urged before us that the punishment of the appellant, having regard to his position, would fall much more heavily on him—that it would be his ruin. That point was considered in *Rex* v. *Cargill*, 1913, 2 K. B. 271; 77 J. P. 348; 8 Cr. App. R. 224. Channell

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J., in giving the judgment of the Court, says: "An appeal has been made to us because of the serious consequences which a conviction has to a man in this position. Punishment is sometimes imposed for the sake of others . . . it is very desirable, if possible, to pass a sentence on a man in a good position exactly the same as on a man in a different position; it is true the sentence is harder, but the offence is correspondingly greater—the man ought to know better . . ." In the opinion of the Court they cannot interfere with the sentence.

Appeal dismissed.

Solicitors for the Appellant—*Lloyd, Richardson & Co.*

H. C.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE AVORY AND MR. JUSTICE BRANSON.

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JAMES COOK.

Severity of sentence.

Appeal against sentence by leave of the Court.

Appellant in person.

Appellant was convicted at the Berkshire Quarter Sessions, on April 3rd, 1922, of housebreaking (with another man) in the daytime, and stealing sevenpence, and was sentenced by the learned Chairman to seven years' penal servitude.

DARLING J.: Appellant was convicted for the first time in 1904, when he was quite young, and has twice been in penal servitude. In 1918 he was released earlier than usual, and served as officer's batman in the Flying Corps; he was discharged with a "good character" owing to a deformity of his feet, from which he still suffers. Thus he is not yet a hopeless criminal, and in

1922
17 *July.*

JAMES COOK.

Darling J.

order to encourage him to reform we reduce his sentence to eighteen months' imprisonment with hard labour. We do this with doubt, and in the hope that he will take advantage of our clemency; it is his last chance.

Sentence reduced.

H. C.

CHARLES RAPER.

Severity of sentence.

When on a charge of a graver offence a plea of guilty to a lesser is accepted, care must be taken only to sentence for the latter.

Appellant pleaded guilty at the Central Criminal Court, on May 24th, 1922, to an indecent assault on his step-daughter, and was sentenced by Mr. Commissioner Atherley Jones to two years' imprisonment with hard labour. He appealed by leave of the Court against sentence.

Appellant in person.

Gattie for the Crown. The prosecution was obliged to drop the more serious charge of rape, because it was doubtful whether the statement of the girl or of her mother would support that charge. There was no previous conviction.

AVORY J.: It is impossible to resist the suggestion that the learned Commissioner, in passing sentence, was influenced by the graver offence which the prosecution admitted that they could not prove. This ought not to be. The sentence is reduced to six months' imprisonment with hard labour.

Sentence reduced.

H. C.

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